

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -x

3   NATIONAL FEDERATION OF INDEPENDENT :

4   BUSINESS, ET AL., :

5                   Petitioners                   :   No. 11-393

6                   v.                               :

7   KATHLEEN SEBELIUS, SECRETARY OF :

8   HEALTH AND HUMAN SERVICES, ET AL. :

9   - - - - -x

10   and

11   - - - - -x

12   FLORIDA, ET AL., :

13                   Petitioners                   :   No. 11-400

14                   v.                               :

15   DEPARTMENT OF HEALTH AND :

16   HUMAN SERVICES, ET AL. :

17   - - - - -x

18   Washington, D.C.

19   Wednesday, March 28, 2012

20

21                   The above-entitled matter came on for oral  
22   argument before the Supreme Court of the United States  
23   at 10:19 a.m.

24   APPEARANCES:

25   PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

1       Petitioners.

2       EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

3       Department of Justice, Washington, D.C.; on behalf of

4       Respondents.

5       H. BARTOW FARR, III, ESQ., Washington, D.C..; for

6       Court-appointed amicus curiae.

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1 P R O C E E D I N G S

2 (10:19 a.m.)

3 CHIEF JUSTICE ROBERTS: We will continue  
4 argument this morning in Case Number 11-393, National  
5 Federation of Independent Business v. Sebelius and case  
6 11-400, Florida v. The Department of HHS.

7 Mr. Clement.

8 ORAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE PETITIONERS

10 MR. CLEMENT: Mr. Chief Justice, and may it  
11 please the Court:

12 If the individual mandate is  
13 unconstitutional, then the rest of the Act cannot stand.  
14 As Congress found and the Federal Government concedes,  
15 the community rating and guaranteed-issue provisions of  
16 the Act cannot stand without the individual mandate.  
17 Congress found that the individual mandate was essential  
18 to their operation. And not only can guaranteed-issue  
19 and community-rating not stand, not operate in the  
20 manner that Congress intended, they would actually  
21 counteract Congress's basic goal of providing patient  
22 protection but also affordable care.

23 If you do not have the individual mandate to  
24 force people into the market then community rating and  
25 guaranteed-issue will cause the cost of premiums to

1 skyrocket. We can debate the order of magnitude of that  
2 but we can't debate that the direction will be upward.  
3 We also can't debate --

4 JUSTICE SOTOMAYOR: Counsel, that may well  
5 be true. The economists are going back and forth on  
6 that issue, and the figures vary from up 10 percent to  
7 up 30. We are not in the habit of doing the legislative  
8 findings.

9 What we do know is that for those States  
10 that found prices increasing, that they found various  
11 solutions to that. In one instance, and we might or may  
12 not say that it's unconstitutional, Massachusetts passed  
13 the mandatory coverage provision. But others adjusted  
14 some of the other provisions.

15 Why shouldn't we let Congress do that, if in  
16 fact, the economists prove, some of the economists prove  
17 right, that prices will spiral? What's wrong with  
18 leaving it to -- in the hands of the people who should  
19 be fixing this, not us?

20 MR. CLEMENT: Well, a couple of questions --  
21 a couple of responses, Justice Sotomayor. First of all,  
22 I think that it's very relevant here that Congress had  
23 before it as examples some of the States that had tried  
24 to impose guaranteed-issue and community rating and did  
25 not impose an individual mandate. And Congress rejected

1    that model.  So your question is quite right in the  
2    saying that it's not impossible to have guaranteed-issue  
3    and community-rating without an individual mandate.  But  
4    it's a model that Congress looked at and specifically  
5    rejected.

6                   And then, of course, there is Congress's own  
7    finding, and their finding, of course, this is (i),  
8    which is 43(a) of the government's brief in the appendix,  
9    Congress specifically found that having the individual  
10   mandate is essential to the operation of  
11   guaranteed-issue and community-rating.

12                   JUSTICE SOTOMAYOR:  That's all it said it's  
13   essential to.  I mean, I'm looking at it.  The  
14   exchanges, the State exchanges are information-  
15   gathering facilities that tell insurers what the various  
16   policies actually mean.  And that has proven to be a  
17   cost saver in many of the States who have tried it.  So  
18   why should we be striking down a cost saver when if what  
19   your argument is, was, that Congress was concerned about  
20   costs rising?  Why should we assume they wouldn't have  
21   passed that information?

22                   MR. CLEMENT:  I think a couple of things.  
23   One, you get -- I mean, I would think you are going to  
24   have to take the bitter with the sweet.  And if  
25   Congress -- if we are going to look at Congress's goal

1 of providing patient protection but also affordable  
2 care, we can't -- I don't think it works to just take  
3 the things that save money and cut out the things that  
4 are going to make premiums more expensive. But at a  
5 minimum --

6 JUSTICE SOTOMAYOR: I want a bottom line is  
7 why don't we let Congress fix it?

8 MR. CLEMENT: Well, let me answer the bottom  
9 line question, which is, no matter what you do in this  
10 case, at some point there's going to be -- if you strike  
11 down the mandate, there is going to be something for  
12 Congress to do. The question is really, what task do  
13 you want to give Congress. Do you want to give Congress  
14 the task of fixing the statute after something has been  
15 taken out, especially a provision at the heart, or do  
16 you want to give Congress the task of fixing health  
17 care? And I think it would be better in this  
18 situation --

19 JUSTICE SOTOMAYOR: We are not taking -- If  
20 we strike down one provision, we are not taking that  
21 power away from Congress. Congress could look at it  
22 without the mandatory coverage provision and say, this  
23 model doesn't work; let's start from the beginning. Or  
24 it could choose to fix what it has. We are not  
25 declaring -- one portion doesn't force Congress into any

1 path.

2 MR. CLEMENT: And of course that's right,  
3 Justice Sotomayor, and no matter what you do here,  
4 Congress will have the options available. So if you, if  
5 you strike down only the individual mandate, Congress  
6 could say the next day: Well, that's the last thing we  
7 ever wanted to do so we will strike down the rest of the  
8 statute immediately and then try to fix the problem. So  
9 whatever you do, Congress is going to have options. The  
10 question is --

11 JUSTICE SCALIA: Well, there is such a thing  
12 as legislative inertia, isn't there?

13 MR. CLEMENT: That's exactly what I was  
14 going to say, Justice Scalia, which is, I think the  
15 question for this Court is, we all recognize there is  
16 legislative inertia. And then the question is: What is  
17 the best result in light of that reality?

18 JUSTICE SOTOMAYOR: Are you suggesting that  
19 we should take on more power to the Court?

20 MR. CLEMENT: No --

21 JUSTICE SOTOMAYOR: Because Congress would  
22 choose to take one path rather than another. That's  
23 sort of taking onto the Court more power than one I  
24 think would want.

25 MR. CLEMENT: And I agree. We are simply

1 asking this Court to take on straight on the idea of the  
2 basic remedial inquiry into severability which looks to  
3 be intent of the Congress --

4 JUSTICE SCALIA: Mr. Clement, I want to ask  
5 you about that. Why -- why do we look to the -- are you  
6 sure we look to the intent of the Congress? I thought  
7 that, you know, sometimes Congress says that these  
8 provisions will -- all the provisions of this Act will  
9 be severable. And we ignore that when the Act really  
10 won't work. When the remaining provisions just won't  
11 work. Now how can you square that reality with the  
12 proposition that what we're looking for here is what  
13 would this Congress have wanted?

14 MR. CLEMENT: Well, two responses,  
15 Justice Scalia. We can look at this Court's cases on  
16 severability, and they all formulate the task a little  
17 bit differently.

18 JUSTICE SCALIA: Yes, they sure do.

19 MR. CLEMENT: And every one of them talks  
20 about congressional intent. But here's, here's the  
21 other answer --

22 JUSTICE SCALIA: That's true, but is it  
23 right?

24 MR. CLEMENT: It is right. And here is how  
25 I would answer your question, which is, when Congress

1 includes a severability clause, it is addressing the  
2 issue in the abstract. It doesn't say: No matter which  
3 provisions you strike down, we absolutely, positively  
4 want what's left.

5 JUSTICE SCALIA: All right. The consequence  
6 of your proposition, would Congress have enacted it  
7 without this provision, okay that's the consequence.  
8 That would mean that if we struck down nothing in this  
9 legislation but the -- what you call the corn husker  
10 kickback, okay, we find that to violate the  
11 constitutional proscription of venality, okay?

12 (Laughter.)

13 JUSTICE SCALIA: When we strike that down,  
14 it's clear that Congress would not have passed it  
15 without that. It was the means of getting the last  
16 necessary vote in the Senate. And you are telling us  
17 that the whole statute would fall because the corn  
18 husker kickback is bad. That can't be right.

19 MR. CLEMENT: Well, Justice Scalia, I think  
20 it can be, which is the basic proposition, that it's  
21 congressional intent that governs. Now everybody on  
22 this Court has a slightly different way of dividing  
23 legislative intent. And I would suggest the one common  
24 brand among every member of this Court as I understand  
25 it is you start with the text. Everybody can agree with

1     that.

2                   JUSTICE KAGAN:   So Mr. Clement, let's start  
3     with the text.  Then you suggest, and I think that there  
4     is -- this is right, that there is a textual basis for  
5     saying that the guaranteed-issue and the community  
6     ratings provisions are tied to the mandate.  And you  
7     said -- you pointed to where that was in the findings.

8                   Is there a textual basis for anything else,  
9     because I've been unable to find one.  It seems to me  
10    that if you look at the text, the sharp dividing line is  
11    between guaranteed-issue and community ratings on the  
12    one hand, everything else on the other.

13                  MR. CLEMENT:  Well, Justice Kagan I would be  
14    delighted to take you through my view of the text and  
15    why there are other things that have to fall.

16                  The first place I would ask you to look is  
17    finding J which is on the same page 43 A.  And as I read  
18    that, that's a finding that the individual mandate is  
19    essential to the operation of the exchanges.  But there  
20    are other links between guaranteed-issue and community  
21    ratings and the exchanges.  And there I think it's just  
22    the way that the exchanges are supposed to work.  And  
23    the text makes this clear is they are supposed to  
24    provide a market where people can compare community  
25    rated insurance.  That's what makes the exchanges

1 function.

2 JUSTICE KAGAN: Although the exchanges  
3 function perfectly well in Utah where there is no  
4 mandate. They function differently, but they function.  
5 And the question is always, does Congress want half a  
6 loaf. Is half a loaf better than no loaf? And on  
7 something like the exchanges it seems to me a perfect  
8 example where half a loaf is better than no loaf. The  
9 exchanges will do something. They won't do everything  
10 that Congress envisioned.

11 MR. CLEMENT: Well, Justice Kagan, I think  
12 there are situations where half a loaf is actually worse  
13 and I want to address that. But before I do it --  
14 broadly. But before I do that, if I could stick with  
15 just the exchanges.

16 I do think the question that this Court is  
17 supposed to ask is not just whether they can limp along  
18 and they can operate independently, but whether they  
19 operate in the manner that Congress intended. And  
20 that's where I think the exchanges really fall down.

21 Because the vision of the exchanges was that  
22 if you got out of this current situation where health  
23 insurance is basically individualized price based on  
24 individualized underwriting and you provide community  
25 ratings, then it's going to be very easy for people to

1 say okay, well this is a silver policy and this is a  
2 bronze policy and this is a gold policy and we can, you  
3 know, I can just pick which insurer provides what I  
4 think is going to be the best service based on those  
5 comparable provisions.

6 JUSTICE KAGAN: Mr. Clement, you just said  
7 something which you say a lot in your brief. You say  
8 the question is the manner in which it would have  
9 operated. And I think that that's not consistent with  
10 our cases. And I guess the best example would be Booker  
11 where we decided not to sever provisions,  
12 notwithstanding that the sentencing guidelines clearly  
13 operate in a different manner now than they did when  
14 Congress passed them. They operate as advisory rather  
15 than mandatory.

16 MR. CLEMENT: Well, but Justice Kagan, I  
17 mean I actually think Booker supports our point as well,  
18 because there are two aspects of the remedial holding of  
19 Booker. And the first part of it, which I think  
20 actually very much supports our point is where the  
21 majority rejects the approach of the dissent, which  
22 actually would have required nothing in the statute to  
23 have been struck, not a single word.

24 But nonetheless this Court said, well, if  
25 you do that then all of the sentencing is basically

1 going to be done by a combination of the juries and the  
2 prosecutors and the judges are going to be cut out. And  
3 the Court said the one thing we know is that's not the  
4 manner in which Congress thought that this should  
5 operate.

6 Now later they make a different judgment  
7 about the -- which particular provisions to cut out.  
8 But I do think Booker is consistent with this way of  
9 looking at it and certainly consistent with Brock, the  
10 opinion we rely on because there the Court only reached  
11 that part of the opinion after they already found that  
12 the must-hire provision operated functionally  
13 independent from the legislative detail, so --

14 JUSTICE GINSBURG: Mr. Clement, there are so  
15 many things in this Act that are unquestionably okay. I  
16 think you would concede that reauthorizing what is the  
17 Indian Healthcare Improvement Act changes to long  
18 benefits, why make Congress redo those? I mean it's a  
19 question of whether we say everything you do is no good,  
20 now start from scratch, or to say, yes, there are many  
21 things in here that have nothing to do frankly with the  
22 affordable healthcare and there are some that we think  
23 it's better to let Congress to decide whether it wants  
24 them in or out.

25 So why should we say it's a choice between a

1 wrecking operation, which is what you are requesting, or  
2 a salvage job. And the more conservative approach would  
3 be salvage rather than throwing out everything.

4 MR. CLEMENT: Well, Justice Ginsburg, two  
5 kinds of responses to that. One, I do think there are  
6 some provisions that I would identify as being at the  
7 periphery of this statute. And I'll admit that the case  
8 for severing those is perhaps the strongest.

9 But I do think it is fundamentally  
10 different, because if we were here arguing that some  
11 provision on the periphery of the statute, like the  
12 Biosimilars Act or some of the provisions that you've  
13 mentioned was unconstitutional, I think you'd strike it  
14 down and you wouldn't even think hard about  
15 severability.

16 What makes this different is that the  
17 provisions that have constitutional difficulties or are  
18 tied at the hip to those provisions that have the  
19 constitutional difficulty are the very heart of this  
20 Act. And then if you look at how they are textually  
21 interconnected to the exchanges, which are then  
22 connected to the tax credits, which are also connected  
23 to the employer mandates, which is also connected to  
24 some of the revenue offsets, which is also connected to  
25 Medicaid, if you follow that through what you end up

1 with at the end of that process is just sort of a hollow  
2 shell. And at that point I think there is a strong  
3 argument for not -- I mean, you can't possibly think  
4 that Congress would have passed that hollow shell  
5 without the heart of the Act.

6 CHIEF JUSTICE ROBERTS: Well, but it would  
7 have -- it would have passed parts of the hollow shell.  
8 I mean, a lot of this is reauthorization of  
9 appropriations that have been reauthorized for the  
10 previous 5 or 10 years and it was just more convenient  
11 for Congress to throw it in in the middle of the  
12 2700 pages than to do it separately. I mean, can you  
13 really suggest -- I mean, they've cited the Black Lung  
14 Benefits Act and those have nothing to do with any of  
15 the things we are talking about.

16 MR. CLEMENT: Well, Mr. Chief Justice, they  
17 tried to make them germane. But I'm not here to tell  
18 you that -- some of their -- surely there are provisions  
19 that are just looking for the next legislative vehicle  
20 that is going to make it across the finish line and  
21 somebody's going to attach it to anything that is  
22 moving. I mean, I'll admit that.

23 But the question is when everything else  
24 from the center of the Act is interconnected and has to  
25 go, if you follow me that far, then the question is

1 would you keep this hollowed-out shell?

2 JUSTICE SOTOMAYOR: Well, but it's not --

3 JUSTICE KENNEDY: But I'm still not sure,  
4 what is the test -- and this was the colloquy you had  
5 with Justice Scalia with the corn husker hypothetical.  
6 So I need to know what standard you are asking me to  
7 apply. Is it whether as a rational matter separate  
8 parts could still function, or does it focus on the  
9 intent of the Congress?

10 If you -- suppose you had party A wants  
11 proposal number 1, party B wants proposal number 2.  
12 Completely unrelated. One is airline rates, the other  
13 is milk regulation. And we -- and they decide them  
14 together. The procedural rules are these have to be  
15 voted on as one. They are both passed. Then one is  
16 declared unconstitutional. The other can operate  
17 completely independently. Now, we know that Congress  
18 would not have intended to pass one without the other.  
19 Is that the end of it, or is there some different test?  
20 Because we don't want to go into legislative history,  
21 that's intrusive, so we ask whether or not an objective  
22 -- as an objective rational matter one could function  
23 without -- I still don't know what the test is that we  
24 are supposed to apply. And this is the same question as  
25 Justice Scalia asked. Could you give me some help on

1     that?

2                   MR. CLEMENT:   Sure.   Justice Kennedy, the  
3     reality is I think this Court's opinions have at various  
4     times applied both strains of the analysis.

5                   JUSTICE KENNEDY:   And which one -- and what  
6     test do you suggest that we follow if we want to clarify  
7     our jurisprudence?

8                   MR. CLEMENT:   I'm -- I'm a big believer in  
9     objective tests, Justice Kennedy.   I would be perfectly  
10    happy with you to apply a more textually based objective  
11    approach.   I think there are certain justices that are  
12    more inclined to take more of a peek at legislative  
13    history, and I think if you look at the legislative  
14    history of this it would only fortify the conclusion  
15    that you would reach from a very objective textual  
16    inquiry.   But I am happy to focus the Court on the  
17    objective textual inquiry.

18                   CHIEF JUSTICE ROBERTS:   I don't  
19    understand --

20                   JUSTICE KENNEDY:   And that objective test is  
21    what?

22                   MR. CLEMENT:   Is whether the statute can  
23    operate in the manner that Congress -- that Congress  
24    intended.

25                   JUSTICE SOTOMAYOR:   No statute can do that,

1 because once we chop off a piece of it, by definition,  
2 it's not the statute Congress passed. So it has to be  
3 something more than that.

4 MR. CLEMENT: Justice Sotomayor, every one  
5 of your cases, if you have a formulation for  
6 severability, if you interpret it woodenly it becomes  
7 tautological. And Justice Blackmun addressed this in  
8 footnote 7 of the Brock opinion that we rely on, where  
9 he says: Of course it's not just -- you know, it  
10 doesn't operate exactly in the manner because it doesn't  
11 have all the pieces, but you still make an inquiry as to  
12 whether when Congress links two provisions together and  
13 one really won't work without the other --

14 JUSTICE SOTOMAYOR: So what is wrong with  
15 the presumption that our law says, which is we presume  
16 that Congress would want to sever? Wouldn't that be the  
17 simplest, most objective test? Going past what  
18 Justice Scalia says we have done, okay, get rid of  
19 legislative intent altogether, which some of our  
20 colleagues in other contexts have promoted, and just  
21 say: Unless Congress tells us directly, it's not  
22 severable, we shouldn't sever. We should let them fix  
23 their problems.

24 You still haven't asked -- answered me why  
25 in a democracy structured like ours, where each branch

1 does different things, why we should involve the Court  
2 in making the legislative judgment?

3 MR. CLEMENT: Justice Sotomayor let me try  
4 to answer the specific question and then answer the big  
5 picture question. The specific question is, I mean, you  
6 could do that. You could adopt a new rule now that  
7 basically says, look, we've severed --

8 JUSTICE SOTOMAYOR: It's not a new rule. We  
9 presume. We've rebutted the presumption in some  
10 cases -- -

11 MR. CLEMENT: Right.

12 JUSTICE SOTOMAYOR: But some would call that  
13 judicial action.

14 MR. CLEMENT: I think in fairness, though,  
15 Justice Sotomayor, to get to the point you are wanting  
16 to get to, you would have to ratchet up that presumption  
17 a couple of ticks on the scale, because the one thing --

18 JUSTICE SOTOMAYOR: And what's wrong with  
19 that?

20 MR. CLEMENT: Well, one thing that's wrong  
21 with that, which is still at a smaller level, is that's  
22 inconsistent with virtually every statement in every one  
23 of your severability opinions, which all talk about  
24 congressional intent.

25 JUSTICE KAGAN: Well, it's not inconsistent

1 with our practice, right, Mr. Clement? I mean, you have  
2 to go back decades and decades and decades, and I'm not  
3 sure even then you could find a piece of legislation  
4 that we refused to sever for this reason.

5 MR. CLEMENT: I don't think that's right,  
6 Justice Kagan. I think there are more recent examples.  
7 A great example I think which sort of proves, and maybe  
8 is a segue to get to my broader point, is a case that  
9 involves a State statute, not a Federal statute, but I  
10 don't think anything turns on that, is Randall against  
11 Sorrell, where this Court struck down various provisions  
12 of the Vermont campaign finance law.

13 But there were other contribution provisions  
14 that were not touched by the theory that the Court used  
15 to strike down the contribution limits. But this Court  
16 at the end of the opinion said: There is no way to  
17 think that the Vermont legislator would have wanted  
18 these handful of provisions there on the contribution  
19 side, so we will strike down the whole thing.

20 And if I could make the broader point, I  
21 mean, I think the reason it makes sense in the democracy  
22 with separation of powers to in some cases sever the  
23 whole thing is because sometimes a half a loaf is worse.  
24 And a great example, if I dare say so, is Buckley. In  
25 Buckley this Court looked at a statute that tried to, in

1 a coherent way, strike down limits on contributions and  
2 closely related expenditures.

3 This Court struck down the ban on  
4 expenditures, left the contribution ban in place, and  
5 for 4 decades Congress has tried to fix what's left of  
6 the statute, largely unsuccessfully, whereas it would  
7 have I think worked much better from a democratic and  
8 separation of powers standpoint if the Court would have  
9 said: Look, expenditures are -- you can't limit  
10 expenditures under the Constitution; the contribution  
11 provision is joined at the hip. Give Congress a chance  
12 to actually fix the problem.

13 JUSTICE KAGAN: Mr. Clement --

14 JUSTICE BREYER: Could I ask you one  
15 question, which is a practical question. I take as a  
16 given your answer to Justice Kennedy, you are saying  
17 let's look at it objectively and say what Congress has  
18 intended, okay? This is the mandate in the community,  
19 this is Titles I and II, the mandate, the community,  
20 pre-existing condition, okay? Here's the rest of it,  
21 you know, and when I look through the rest of it, I have  
22 all kinds of stuff in there. And I haven't read every  
23 word of that, I promise. As you pointed out, there is  
24 biosimilarity, there is breast feeding, there is  
25 promoting nurses and doctors to serve underserved areas,

1     there is the CLASS Act, etcetera.

2                   What do you suggest we do? I mean, should  
3     we appoint a special master with an instruction? Should  
4     we go back to the district court? You haven't argued  
5     most of these. As I hear you now, you're pretty close  
6     to the SG. I mean, you'd like it all struck down, but  
7     we are supposed to apply the objective test. I don't  
8     know if you differ very much.

9                   So what do you propose that we do other than  
10    spend a year reading all this and have you argument all  
11    this?

12                  MR. CLEMENT: Right. What I would propose  
13    is the following, Justice Breyer, is you follow the  
14    argument this far and then you ask yourself whether what  
15    you have left is a hollowed-out shell or whether --

16                  JUSTICE BREYER: I would say the Breast  
17    Feeding Act, the getting doctors to serve underserved  
18    areas, the biosimilar thing and drug regulation, the  
19    CLASS Act, those have nothing to do with the stuff that  
20    we've been talking about yesterday and the day before,  
21    okay?

22                  So if you ask me at that level, I would say,  
23    sure, they have nothing to do with it, they could stand  
24    on their own. The Indian thing about helping the  
25    underserved Native Americans, all that stuff has nothing

1 to do. Black lung disease, nothing to do with it, okay?

2 So that's -- do you know what you have  
3 there? A total off-the-cuff impression. So that's why  
4 I am asking you, what should I do?

5 MR. CLEMENT: What you should do, is let me  
6 say the following, which is follow me this far, which is  
7 mandatory, individual mandate is tied, as the government  
8 suggests, to guaranteed-issue and community rating, but  
9 the individual mandate, guaranteed-issue, and community  
10 rating together are the heart of this Act. They are  
11 what make the exchanges work.

12 The exchanges in turn are critical to the  
13 tax credits, because the amount of the tax credit is key  
14 to the amount of the policy price on the exchange. The  
15 exchanges are also key to the employer mandate, because  
16 the employer mandate becomes imposed on an employer if  
17 one of the employees gets insurance on the exchanges.

18 But it doesn't stop there. Look at the  
19 Medicare provision for DISH hospitals, okay? These are  
20 hospitals that serve a disproportionate share of the  
21 needy. This isn't in Title I. It's in the other part  
22 that you had in your other hand. But it doesn't work  
23 without the mandate, community rating and  
24 guaranteed-issue.

25 JUSTICE ALITO: Well, can I ask you this,

1 Mr. Clement?

2 MR. CLEMENT: Sure.

3 JUSTICE ALITO: What would your fallback  
4 position be if -- if we don't accept the proposition  
5 that if the mandate is declared unconstitutional, the  
6 rest of the Act, every single provision, has to fall?  
7 Other -- proposed other dispositions have been proposed.  
8 There's the Solicitor General's disposition, the  
9 recommended disposition to strike down the  
10 guaranteed-issue and community rating provisions. One  
11 of the -- one amicus says strike down all of Title I,  
12 another one says strike down all of Title I and Title  
13 II.

14 What -- what would you suggest?

15 MR. CLEMENT: Well, I -- I think what I  
16 would suggest, Justice Alito -- I don't want to be  
17 unresponsive -- is that you sort of follow the argument  
18 through and figure out what in the core of the Act  
19 falls. And then I guess my fallback would be if what's  
20 left is a hollowed-out shell, you could just leave that  
21 standing.

22 If you want a sort of practical answer, I  
23 mean, I do think you could just -- you know, you could  
24 use Justice Breyer's off-the-cuff as a starting point  
25 and basically say, you know, Title I and a handful of

1 related provisions that are very closely related to that  
2 are -- are really the heart of the Act --

3 CHIEF JUSTICE ROBERTS: Well, that's --

4 MR. CLEMENT: -- the bigger volume -- on the  
5 other hand -- I mean, you could strike one and leave the  
6 other, but at a certain point -- I'm sorry,  
7 Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Finish your certain  
9 point.

10 MR. CLEMENT: At -- at a certain point, I  
11 just think that, you know, the better answer might be to  
12 say, we've struck the heart of this Act, let's just give  
13 Congress a clean slate. If it's so easy to have that  
14 other big volume get reenacted, they can do it in a  
15 couple of days; it won't be a big deal. If it's not,  
16 because it's very --

17 (Laughter.)

18 MR. CLEMENT: -- well, but -- I mean, you  
19 can laugh at me if you want, but the point is, I'd  
20 rather suspect that it won't be easy. Because I rather  
21 suspect that if you actually dug into that, there'd be  
22 something that was quite controversial in there and it  
23 couldn't be passed quickly --

24 CHIEF JUSTICE ROBERTS: But the -- the --

25 MR. CLEMENT: -- and that's our whole point.

1 CHIEF JUSTICE ROBERTS: -- the -- the  
2 reality of the passage -- I mean, this was a piece of  
3 legislation which, there was -- had to be a concerted  
4 effort to gather enough votes so that it could be  
5 passed. And I suspect with a lot of these miscellaneous  
6 provisions that Justice Breyer was talking about, that  
7 was the price of the vote.

8 Put in the Indian health care provision and  
9 I will vote for the other 2700 pages. Put in the black  
10 lung provision, and I'll go along with it. That's why  
11 all -- many of these provisions I think were put in, not  
12 because they were unobjectionable. So presumably what  
13 Congress would have done is they wouldn't have been able  
14 to put together, cobble together, the votes to get it  
15 through.

16 MR. CLEMENT: Well, maybe that's right,  
17 Mr. Chief Justice. And I don't want to, I mean, spend  
18 all my time on -- fighting over the periphery, because I  
19 do think there are some provisions that I think you  
20 would make as -- as an exercise of your own judgment,  
21 the judgment that once you've gotten rid of the core  
22 provisions of this Act, that you would then decide to  
23 let the periphery fall with it. But if you want to keep  
24 the periphery, that's fine. What I think is important,  
25 though, as to the core provisions of the Act, which

1   aren't just the mandate community rating and  
2   guaranteed-issue, but include the exchanges, the tax  
3   credit, Medicare and Medicaid -- as to all of that, I  
4   think you do want to strike it all down to avoid a redux  
5   of Buckley.

6                   If I could reserve the remainder of my time.

7                   CHIEF JUSTICE ROBERTS: Thank you,  
8   Mr. Clement.

9                   Mr. Kneedler.

10                  ORAL ARGUMENT OF EDWIN S. KNEEDLER

11                  ON BEHALF OF THE RESPONDENTS

12                  MR. KNEEDLER: Thank you, Mr. Chief Justice,  
13   and may it please the Court:

14                  There should be no occasion for the Court in  
15   this case to consider issues of severability, because as  
16   we argue, the -- the minimum coverage provision is fully  
17   consistent with Article I of the Constitution. But if  
18   the Court were to conclude otherwise, it should reject  
19   Petitioners' sweeping proposition that the entire Act  
20   must fall if this one provision is held  
21   unconstitutional.

22                  As an initial matter, we believe the Court  
23   should not even consider that question. The vast  
24   majority of the provisions of this Act do not even apply  
25   to the Petitioners, but instead apply to millions of

1 citizens and businesses who are not before the Court --

2 CHIEF JUSTICE ROBERTS: How does your

3 proposal actually work? Your idea is that, well, they

4 can take care of it themselves later. I mean, do you

5 contemplate them bringing litigation and saying -- I

6 guess the insurers would be the most obvious ones --

7 without -- without the mandate, the whole thing falls

8 apart and we're going to bear a greater cost, and so the

9 rest of the law should be struck down.

10 And that's a whole other line of litigation?

11 MR. KNEEDLER: Well, I -- I think the

12 continuing validity of any particular provision would

13 arise in litigation that would otherwise arise under

14 that provision by parties who are actually --

15 CHIEF JUSTICE ROBERTS: But what cause of

16 action is it? I've never heard of a severability cause

17 of action.

18 MR. KNEEDLER: Well, in the first place, I

19 don't -- the point isn't that there has to be a -- an

20 affirmative cause of action to decide this. You

21 could -- for example, to use the Medicare reimbursement

22 issue is, one of the things that this Act does is change

23 Medicare reimbursement rates. Well, the place where

24 someone adjudicates the validity of Medicare

25 reimbursement rates is through the special statutory

1 review procedure for that.

2 And the same thing is true of the  
3 Anti-Injunction Act --

4 JUSTICE SCALIA: Mr. Kneedler, there --  
5 there are some provisions which nobody would have  
6 standing to challenge. If the provision is simply an  
7 expenditure of Federal money, it -- it doesn't hurt  
8 anybody except the taxpayer, but the taxpayer doesn't  
9 have standing. That -- that just continues.

10 Even though it -- it is -- it should -- it  
11 is so closely aligned to what's been struck down that it  
12 ought to go as well. But nonetheless, that has to  
13 continue because there's nobody in the world that can  
14 challenge it.

15 Can that possibly be the law?

16 MR. KNEEDLER: I think that proves our  
17 point, Justice Scalia. This Court has repeatedly said  
18 that just because there's -- no one may have standing to  
19 challenge -- and particularly like tax credits or taxes  
20 which are challenged only after going through the  
21 Anti-Injunction Act -- just because no one has standing  
22 doesn't mean that someone must.

23 But beyond that --

24 JUSTICE SCALIA: But -- but those are  
25 provisions that have been legitimately enacted. The

1 whole issue here is whether these related provisions  
2 have been legitimately enacted, or whether they are so  
3 closely allied to one that has been held to be  
4 unconstitutional that they also have not been  
5 legitimately enacted.

6 You -- you can't compare that to -- to cases  
7 dealing with a -- a statute that nobody denies is -- is  
8 constitutional.

9 MR. KNEEDLER: This -- this case is directly  
10 parallel to the Printz case, in our view. In that case,  
11 the Court struck down several provisions of the Brady  
12 Act, but went on to say it had no business addressing  
13 the severability of other provisions that did not apply  
14 to the people before whom --

15 JUSTICE SOTOMAYOR: But --

16 JUSTICE BREYER: What he's thinking of is  
17 this: I think Justice Scalia is thinking, I suspect, of  
18 -- imagine a tax which says, this tax, amount Y, goes to  
19 purpose X, which will pay for half of purpose X. The  
20 other half will come from the exchanges somehow. That  
21 second half is unconstitutional. Purpose X can't  
22 possibly be carried out now with only half the money.

23 Does the government just sit there  
24 collecting half the money forever because nobody can  
25 ever challenge it? You see, there -- if it were

1     inextricably connected, is it enough to say, well, we  
2     won't consider that because maybe somebody else could  
3     bring that case and then there is no one else?

4                     Is that --

5                     MR. KNEEDLER:   Yes, we think that is the  
6     proper way to proceed.

7                     Severability --

8                     JUSTICE GINSBURG:   It's not a choice between  
9     someone else bringing the case and a law staying in  
10    place.   And what we're really talking about, as Justice  
11    Sotomayor started this discussion, is who is the proper  
12    party to take out what isn't infected by the Court's  
13    holding -- with all these provisions where there may be  
14    no standing, one institution clearly does have standing,  
15    and that's Congress.

16                    And if Congress doesn't want the provisions  
17    that are not infected to stand, Congress can take care  
18    of it.

19                    It's a question of which -- which side --  
20    should the Court say, we're going to wreck the whole  
21    thing, or should the Court leave it to Congress?

22                    MR. KNEEDLER:   We think the Court should  
23    leave it to Congress for two reasons.   One is the point  
24    I'm making now about justiciability, or whether the  
25    Court can properly consider it at all.   And the second

1 is, we think only a few provisions are inseverable from  
2 the minimum coverage provision.

3 I just would like to --

4 CHIEF JUSTICE ROBERTS: Before you go,  
5 Mr. Kneedler, I'd like your answer to Justice Breyer's  
6 question.

7 I think you were interrupted before that --

8 MR. KNEEDLER: Yes. No. We -- we believe  
9 that in that case, the -- the tax -- the tax provision  
10 should not be struck down. In the first place, the  
11 Anti-Injunction Act would bar a -- a direct suit to  
12 challenge it. It would be very strange to allow a tax  
13 to be struck down on the basis of a severability  
14 analysis. Severability arises in a case only where it's  
15 necessary to consider what relief a party before the  
16 Court should get. The only party --

17 JUSTICE ALITO: Suppose that there was --  
18 suppose there was a non-severability provision in -- in  
19 this Act. If one provision were to be held  
20 unconstitutional, then every single -- someone would  
21 have to bring a -- a separate lawsuit challenging every  
22 single other provision in the Act and say, well, one  
23 fell and the Congress said it's all -- it's a package,  
24 it can't be separated.

25 That's your position?

1                   MR. KNEEDLER: The -- the fact that that's  
2 such a clause might make it easy doesn't change the  
3 point. Article III jurisdictional problems apply to  
4 easy questions as well as -- as hard questions.

5                   If I could just --

6                   JUSTICE KENNEDY: But there's no Article III  
7 jurisdictional problem in Justice Alito's hypothetical,  
8 that this is a remedial exercise of the Court's power to  
9 explain the consequences of its judgment in this case.

10                  MR. KNEEDLER: But -- this Court had said  
11 that one has -- has to have standing for every degree of  
12 relief that -- that is sought. That was in Davis, that  
13 was Los Angeles v. Lyons.

14                  JUSTICE SCALIA: Mr. Kneedler --

15                  MR. KNEEDLER: -- Daimler/Chrysler --

16                  JUSTICE SCALIA: -- don't you think it's  
17 unrealistic to say leave it to Congress, as though you  
18 are sending it back to Congress for Congress to consider  
19 it dispassionately on balance, should we have this  
20 provision or should we not have provision? That's not  
21 what it's going to be. It's going to be, these  
22 provisions are in effect; even though you -- a lot of  
23 you never wanted them to be in effect, and you only  
24 voted for them because you wanted to get the heart of  
25 the -- the Act, which has now been cut out; but

1     nonetheless these provisions are the law, and you have  
2     to get the votes to overturn them. That's an enormously  
3     different question from whether you get the votes  
4     initially to put them into the law.

5             What -- there, there is no way that this  
6     Court's decision is not going to distort the  
7     congressional process. Whether we strike it all down or  
8     leave some of it in place, the congressional process  
9     will never be the same. One way or another, Congress is  
10    going to have to reconsider this, and why isn't it  
11    better to have them reconsider it -- what -- what should  
12    I say -- in toto, rather than having some things already  
13    in the law which you have to eliminate before you can  
14    move on to consider everything on balance?

15            MR. KNEEDLER: We think as a matter of  
16    judicial restraint, limits on equitable remedial power  
17    limit this Court to addressing the provision that has  
18    been challenged as unconstitutional and anything else  
19    that the plaintiff seeks as relief. Here the only --

20            JUSTICE KENNEDY: But in restraint --

21            JUSTICE SOTOMAYOR: Mr. Kneedler would you  
22    please --

23            CHIEF JUSTICE ROBERTS: Justice Kennedy?

24            JUSTICE KENNEDY: When you say judicial  
25    restraint, you are echoing the earlier premise that it

1 increases the judicial power if the judiciary strikes  
2 down other provisions of the Act. I suggest to you it  
3 might be quite the opposite. We would be exercising the  
4 judicial power if one Act was -- one provision was  
5 stricken and the others remained to impose a risk on  
6 insurance companies that Congress had never intended.  
7 By reason of this Court, we would have a new regime that  
8 Congress did not provide for, did not consider. That,  
9 it seems to me can be argued at least to be a more  
10 extreme exercise of judicial power than to strike --  
11 than striking the whole.

12 MR. KNEEDLER: I -- I -- I think not --

13 JUSTICE KENNEDY: I just don't accept the  
14 premise.

15 MR. KNEEDLER: I think not, Justice Kennedy  
16 and then I -- I will move on.

17 But this is exactly the situation in *Printz*.  
18 The Court identified the severability questions that  
19 were -- that were briefed before the Court as important  
20 ones, but said that they affect people who are -- rights  
21 and obligations of people who are not before the Court.

22 JUSTICE SOTOMAYOR: Mr. Kneedler, move away  
23 from the issue of whether it's a standing question or  
24 not.

25 MR. KNEEDLER: Right.

1 JUSTICE SOTOMAYOR: Make the assumption  
2 that's an -- that this is an issue of the Court's  
3 exercise of discretion. Because the last two questions  
4 had to do with what's wise for the Court to do, not  
5 whether it has power to do it or not.

6 MR. KNEEDLER: Right. That --

7 JUSTICE SOTOMAYOR: So let's move beyond the  
8 power issue, which your answers have centered on, and  
9 give me a sort of -- policy. And I know that's a,  
10 that's a bugaboo word sometimes, but what should guide  
11 the Court's discretion?

12 MR. KNEEDLER: Well, we think that matters  
13 of justiciability do blend into --

14 JUSTICE SOTOMAYOR: Would you please -- I've  
15 asked you three times to move around that.

16 MR. KNEEDLER: -- blend into, blend into  
17 discretion, and in turn blend into the merits of the  
18 severability question. And as to that, just to answer a  
19 question that, that several Justices have asked, we  
20 think that severability is a matter of statutory  
21 interpretation. It should be resolved by looking at the  
22 structure and the text of the Act, and the Court may  
23 look at legislative history to figure out what the text  
24 and structure mean with respect to severability. We  
25 don't --

1 JUSTICE SCALIA: Mr. Kneedler, what happened  
2 to the Eighth Amendment? You really want us to go  
3 through these 2,700 pages?

4 (Laughter.)

5 JUSTICE SCALIA: And do you really expect  
6 the Court to do that? Or do you expect us to -- to give  
7 this function to our law clerks?

8 Is this not totally unrealistic? That we  
9 are going to go through this enormous bill item by item  
10 and decide each one?

11 MR. KNEEDLER: Well --

12 JUSTICE SOTOMAYOR: I thought the answer was  
13 you don't have to because --

14 MR. KNEEDLER: Well, that is, that is the --

15 JUSTICE SOTOMAYOR: -- what we have to look  
16 at is what Congress said was essential, correct?

17 MR. KNEEDLER: That is correct, and I'd also  
18 like to -- going -- I just want to finish the thought I  
19 had about this being a matter of statutory  
20 interpretation. The Court's task, we submit, is not to  
21 look at the legislative process to see whether the bill  
22 would have been -- would have passed or not based on the  
23 political situation at the time, which would basically  
24 convert the Court into a function such as a whip count.  
25 That is not the Court's --

1 JUSTICE KAGAN: And Mr. Kneedler, that would  
2 be a revolution --

3 MR. KNEEDLER: Yes.

4 JUSTICE KAGAN: -- in our severability law,  
5 wouldn't it?

6 MR. KNEEDLER: It would.

7 JUSTICE KAGAN: I mean, we have never  
8 suggested that we were going to say, look, this  
9 legislation was a brokered compromise and we are going  
10 to try to figure out exactly what would have happened in  
11 the complex parliamentary shenanigans that go on across  
12 the street and figure out whether they would have made a  
13 difference.

14 Instead, we look at the text that's actually  
15 given us. For some people, we look only at the text.  
16 It should be easy for Justice Scalia's clerks.

17 (Laughter.)

18 MR. KNEEDLER: I -- I think -- I think  
19 that --

20 JUSTICE SCALIA: I don't care whether it's  
21 easy for my clerks. I care whether it's easy for me.

22 (Laughter.)

23 MR. KNEEDLER: I think that -- I think  
24 that's exactly right. As I said, it is a question of  
25 statutory interpretation.

1 CHIEF JUSTICE ROBERTS: Well, how is that --  
2 what's exactly right? It's a question of statutory  
3 interpretation; that means you have to go through every  
4 line of the statute. I haven't heard your answer to  
5 Justice Scalia's question yet.

6 MR. KNEEDLER: Well, I -- I think in this  
7 case there is an easy answer, and that is, Justice Kagan  
8 pointed out that, that the Act itself creates a sharp  
9 dividing line between the minimum coverage provision --  
10 the package of -- of reforms: The minimum coverage  
11 provision along with the guaranteed-issue and community  
12 rating. That is one package that Congress deemed  
13 essential.

14 CHIEF JUSTICE ROBERTS: How do you know  
15 that? Where is this line? I looked through the whole  
16 Act, I didn't read -- well --

17 MR. KNEEDLER: It is in --

18 CHIEF JUSTICE ROBERTS: Where is the sharp  
19 line?

20 MR. KNEEDLER: It is in Congress's findings  
21 that the -- that the minimum coverage provision --  
22 without it the Court -- the -- Congress said, in finding  
23 I, without that provision people would wait to get  
24 insurance, and therefore -- and cause all the adverse  
25 selection problems that arise.

1 CHIEF JUSTICE ROBERTS: No, no. That --  
2 that makes your case that the one provision should fall  
3 if the other does. It doesn't tell us anything about  
4 all the other provisions.

5 MR. KNEEDLER: Well, I -- I think -- I think  
6 it does, because Congress said it was essential to those  
7 provisions, but it conspicuously did not say that it was  
8 essential to other provisions.

9 CHIEF JUSTICE ROBERTS: Well --

10 JUSTICE ALITO: May I ask you about the  
11 argument that is made in the economists' amicus brief?  
12 They say that the insurance reforms impose 10-year costs  
13 of roughly \$700 billion on the insurance industry, and  
14 that these costs are supposed to be offset by about 350  
15 billion in new revenue from the individual mandate and  
16 350 billion from the Medicaid expansion. Now if the 350  
17 billion -- maybe you will disagree with the numbers,  
18 that they are fundamentally wrong; but assuming they are  
19 in the ballpark, if the 350 million from the individual  
20 mandate were to be lost, what would happen to the  
21 insurance industry, which would now be in the -- in the  
22 hole for \$350 billion over 10 years?

23 MR. KNEEDLER: I don't -- I mean, first of  
24 all, for the Court to go beyond text and legislative  
25 history to try to figure out how the finances of the

1 bill operate, it -- it's like being a budget committee.  
2 But -- but we think the, the economists had added up the  
3 figures wrong. If there is Medicaid expansion, the  
4 insurance -- and the insurance companies are involved in  
5 that, they are going to be reimbursed.

6 CHIEF JUSTICE ROBERTS: But what if there  
7 isn't Medicaid expansion? We've talked about the  
8 individual mandate, but does the government have a  
9 position on what should happen if the Medicaid expansion  
10 is struck down?

11 MR. KNEEDLER: We don't -- we don't think  
12 that that would have any effect. That could be  
13 addressed in the next argument. But we don't think that  
14 would have any effect on the -- on the rest of the -- on  
15 the rest of the Act.

16 CHIEF JUSTICE ROBERTS: So if your -- the  
17 government's position is that if Medicaid expansion is  
18 struck down, the rest of the Act can operate --

19 MR. KNEEDLER: Yes. Yes. It's -- in the  
20 past Congress has expanded Medicaid coverage without  
21 there being -- it's done it many times without there  
22 being a minimum coverage provision.

23 JUSTICE KENNEDY: But I still don't  
24 understand where you are with the answer to  
25 Justice Alito's question.

1           Assume that there is a, a substantial  
2   probability that the 350 billion plus 350 billion equals  
3   7 is going to be cut in half if the individual mandate  
4   is -- is stricken. Assume there is a significant  
5   possibility of that. Is it within the proper exercise  
6   of this Court's function to impose that kind of risk?  
7   Can we say that the Congress would have intended that  
8   there be that kind of risk?

9           MR. KNEEDLER: Well, we don't think it's in  
10   the Court's place to look at the, at the budgetary  
11   implications, and we also --

12           JUSTICE KENNEDY: But isn't that -- isn't  
13   that the point then, why we should just assume that it  
14   is not severable?

15           MR. KNEEDLER: No.

16           JUSTICE KENNEDY: If we -- if we lack the  
17   competence to even assess whether there is a risk, then  
18   isn't this an awesome exercise of judicial power?

19           MR. KNEEDLER: No, I don't --

20           JUSTICE KENNEDY: To say we are doing  
21   something and we are not telling you what the  
22   consequences might be?

23           MR. KNEEDLER: No, I don't think so, because  
24   when you -- when you are talking about monetary  
25   consequences, you are looking through the Act, you are

1 looking behind the Act, rather than -- the Court's  
2 function is to look at the text and structure of the Act  
3 and what the substantive provisions of the Act  
4 themselves mean. And if I could go past --

5 JUSTICE SCALIA: Mr. Kneedler, can I -- can  
6 you give us a prior case in -- that -- that resembles  
7 this one in which we -- we are asked to strike down what  
8 the other side says is the heart of the Act and yet  
9 leave in -- as -- as you request, leave, in effect, the  
10 rest of it? Have we ever -- most of our severability  
11 cases, you know, involve one little aspect of the Act.  
12 The question is whether the rest. When have we ever  
13 really struck down what was the main purpose of the Act,  
14 and left the rest in effect?

15 MR. KNEEDLER: I think Booker is the best  
16 example of that. In -- in Booker the mandatory  
17 sentencing provisions were central to the act, but the  
18 Court said Congress would have preferred a statute  
19 without the mandatory provision in the Act, and the  
20 Court struck that but the rest of the sentencing  
21 guidelines remained.

22 JUSTICE SCALIA: I think the reason -- the  
23 reason the majority said that was they didn't think that  
24 what was essential to the Act was what had been stricken  
25 down, and that is the -- the ability of the judge to say

1 on his own what -- what -- what the punishment would be.  
2 I don't think that's a case where we struck -- where we  
3 excised the heart of the statute.

4 You have another one?

5 MR. KNEEDLER: There is no example --

6 JUSTICE SCALIA: There is no example. This  
7 is really --

8 MR. KNEEDLER: -- to our -- to our -- that  
9 we have found that suggests the contrary.

10 JUSTICE SCALIA: This is really a case of  
11 first impression. I don't know another case where we  
12 have been confronted with this -- with this decision.

13 Can you take out the heart of the Act and  
14 leave everything else in place?

15 MR. KNEEDLER: I would like to go to the  
16 heart of the Act point in a moment. But what I'd like  
17 to say is this is a huge Act with many provisions that  
18 are completely unrelated to market reforms and operate  
19 in different ways. And we think it would be  
20 extraordinary in this extraordinary Act to strike all of  
21 that down because there are many provisions and it would  
22 be too hard to do it.

23 JUSTICE BREYER: I don't think it's not  
24 uncommon that Congress passes an act, and then there are  
25 many titles, and some of the titles have nothing to do

1 with the other titles. That's a common thing. And  
2 you're saying you've never found an instance where they  
3 are all struck out when they have nothing to do with  
4 each other.

5 My question is, because I hear Mr. Clement  
6 saying something not too different from what you say.  
7 He talks about things at the periphery. We can't reject  
8 or accept an argument on severability because it's a lot  
9 of work for us. That's beside the point. But do you  
10 think that it's possible for you and Mr. Clement, on  
11 exploring this, to -- to get together and agree on --

12 (Laughter)

13 JUSTICE BREYER: -- I mean on -- on a list  
14 of things that are in both your opinions peripheral,  
15 then you would focus on those areas where one of you  
16 thinks it's peripheral and one of you thinks it's not  
17 peripheral. And at that point it might turn out to be  
18 far fewer than we are currently imagining. At which  
19 point we could hold an argument or figure out some way  
20 or somebody hold an argument and try to -- try to get  
21 those done.

22 Is -- is that a pipe dream or is that a --

23 MR. KNEEDLER: I -- I -- I just don't think  
24 that is realistic. The Court would be doing it without  
25 the parties, the millions of parties --

1 JUSTICE SCALIA: You can have a conference  
2 committee report afterwards, maybe.

3 (Laughter)

4 MR. KNEEDLER: No, it just -- it just is not  
5 something that a court would ordinarily do. But I would  
6 like --

7 JUSTICE SOTOMAYOR: Could you get back to  
8 the argument of -- of the heart?

9 MR. KNEEDLER: Yes.

10 JUSTICE SOTOMAYOR: Striking down the heart,  
11 do we want half a loaf or show. I think those are the  
12 two analogies --

13 MR. KNEEDLER: Right. And -- and -- and I  
14 would like to discuss it again in terms of the text and  
15 structure of the Act. We have very important  
16 indications from the structure of this Act that the  
17 whole thing is not supposed to fall.

18 The -- the most basic one is, the notion  
19 that Congress would have intended the whole Act to fall  
20 if there couldn't be a minimum coverage provision is  
21 refuted by the fact that there are many, many provisions  
22 of this Act already in effect without a minimum coverage  
23 provision. Two point -- 2 and-a-half million people  
24 under 26 have gotten insurance by one of the insurance  
25 requirements. Three point two billion dollars --

1 JUSTICE SCALIA: Anticipation of the minimum  
2 coverage. That's going to bankrupt the insurance  
3 companies if not the States, unless this minimum  
4 coverage provision comes into effect.

5 MR. KNEEDLER: There is no reason to think  
6 it's going to -- it's going to bankrupt anyone. The  
7 costs will be set to cover those -- to cover those  
8 amounts.

9 JUSTICE SOTOMAYOR: I thought that the  
10 26-year-olds were saying that they were healthy and  
11 didn't need insurance yesterday. So today they are  
12 going to bankrupt the --

13 MR. KNEEDLER: Two and-a-half -- 2.5 million  
14 people would be thrown off the insurance roles if the  
15 Court were to say that. Congress made many changes to  
16 Medicare rates that have gone into effect for the  
17 Congress -- for the courts to have to unwind millions of  
18 Medicare reimbursement rates. Medicare has -- has  
19 covered 32 million insurance -- preventive care visits  
20 by patients as a result of -- of this Act.

21 CHIEF JUSTICE ROBERTS: All of that was  
22 based on the assumption that the mandate was -- was  
23 constitutional. And if -- that certainly doesn't stop  
24 us from reaching our own determination on that.

25 MR. KNEEDLER: No, what I'm saying is it's a

1 question of legislative intent, and we have a very  
2 fundamental indication of legislative intent that  
3 Congress did not mean the whole Act to fall if -- if --  
4 without the minimum coverage provision, because we have  
5 many provisions that are operating now without that.

6 But there's a further indication about why  
7 the line should be drawn where I've suggested, which is  
8 the package of these particular provisions. All the  
9 other provisions of the Act would continue to advance  
10 Congress's goal, the test that was articulated in Booker  
11 but it's been said in Regan and other cases. You look  
12 to whether the other provisions can continue to advance  
13 the purposes of the Act.

14 Here they unquestionably can. The public  
15 health -- the broad public health purposes of the Act  
16 that are unrelated to the minimum coverage provision,  
17 but also that the other provisions designed to enhance  
18 access to affordable care. The employer responsibility  
19 provision, the credit for small businesses, which is  
20 already in effect, by the way, and affecting many small  
21 businesses --

22 JUSTICE SCALIA: But many people might  
23 not -- many of the people in Congress might not have  
24 voted for those provisions if -- if the central part of  
25 this statute was not adopted.

1 MR. KNEEDLER: But that --

2 JUSTICE SCALIA: I mean, you know, you're --  
3 to say that we're effectuating the intent of Congress is  
4 just unrealistic. Once you've cut the guts out of it,  
5 who knows, who knows which of them were really desired  
6 by Congress on their own and which ones weren't.

7 MR. KNEEDLER: The question for the Court is  
8 Congress having passed the law by whatever majority  
9 there might be in one House or the other, Congress  
10 having passed the law, what at that point is -- is -- is  
11 the legislative intent embodied in the law Congress has  
12 actually passed?

13 CHIEF JUSTICE ROBERTS: Well, that's right.  
14 But the problem is, straight from the title we have two  
15 complimentary purposes, patient protection and  
16 affordable care. And you can't look at something and  
17 say this promotes affordable care, therefore, it's  
18 consistent with Congress's intent. Because Congress had  
19 a balanced intent. You can't look at another provision  
20 and say this promotes patient protection without asking  
21 if it's affordable.

22 So, it seems to me what is going to promote  
23 Congress's purpose, that's just an inquiry that you  
24 can't carry out.

25 MR. KNEEDLER: No, with respect, I disagree,

1 because I think it's evident that Congress's purpose was  
2 to expand access to affordable care. It did it in  
3 discreet ways. It did it by the penalty on employers  
4 that don't -- that don't offer suitable care. It did it  
5 by offering tax credits to small employers. It did it  
6 by offering tax credits to purchasers. All of those are  
7 a variety of ways that continue to further Congress's  
8 goal, and -- and most of all, Medicaid, which is --  
9 which is unrelated to the -- to the private insurance  
10 market altogether.

11 And in adopting those other provisions  
12 governing employers and whatnot, Congress built on its  
13 prior experience of using the tax code, which it is --  
14 for a long period of time Congress has subsidized --

15 JUSTICE KENNEDY: I don't quite understand  
16 about the employers. You're -- you are saying Congress  
17 mandated employers to buy something that Congress itself  
18 has not contemplated? I don't understand that.

19 MR. KNEEDLER: No. Employer coverage -- 150  
20 million people in this country already get their  
21 insurance through -- through their employers. What  
22 Congress did in seeking to augment that was to add a  
23 provision requiring employers to purchase insurance --

24 JUSTICE KENNEDY: Based on the assumption  
25 that the cost of those policies would be lowered by --

1 by certain provisions which are by hypothesis -- we are  
2 not sure -- by hypothesis are in doubt.

3 MR. KNEEDLER: No, I -- I -- I think any  
4 cost assumptions -- there is no indication that Congress  
5 made any cost assumptions, but -- but there is no reason  
6 to think that the individual -- that the individual  
7 market, which is where the minimum coverage provision is  
8 directed, would affect that.

9 I would like to say -- I would point out why  
10 the other things would advance Congress's goal. The  
11 point here is that the package of three things would --  
12 would be contrary -- would run contrary to Congress's  
13 goal if you took out the minimum coverage provision.  
14 And here's why -- and this is reflected in the findings:

15 If you take out minimum coverage but leave  
16 in the guaranteed-issue and community-rating, you will  
17 make matters worse. Rates will go up, and people will  
18 be less -- fewer people covered in the individual  
19 market.

20 JUSTICE ALITO: Well, if that is true, what  
21 is the difference between guaranteed-issue and  
22 community-rating provisions on the one hand and other  
23 provisions that increase costs substantially for  
24 insurance companies?

25 For example, the tax on high cost health

1 plans, which the economists in the amicus brief said  
2 would cost \$217 billion over 10 years?

3 MR. KNEEDLER: Those are -- what Congress --  
4 Congress did not think of those things as balancing  
5 insurance companies. Insurance companies are  
6 participants in the market for Medicaid and -- and other  
7 things.

8 JUSTICE KENNEDY: But you are saying we have  
9 -- we have the expertise to make the inquiry you want us  
10 to make, i.e., the guaranteed-issue, but not the  
11 expertise that Justice Alito's question suggests we must  
12 make.

13 MR. KNEEDLER: Well --

14 JUSTICE KENNEDY: I just don't understand  
15 your position.

16 MR. KNEEDLER: -- that's because -- that's  
17 because I think this Court's function is to look at the  
18 text and structure and the legislative history of the  
19 law that Congress enacted, not the financial -- not a  
20 financial balance sheet, which doesn't appear anywhere  
21 in the law. And just --

22 JUSTICE GINSBURG: You are relying on  
23 Congress's quite explicitly tying these three things  
24 together.

25 MR. KNEEDLER: We do. That's -- that's --

1 and it's not just the text of the act, but the  
2 background of the act, the experience in the state, the  
3 testimony of the National Association of Insurance  
4 Commissioners.

5 That's the -- that's the problem Congress  
6 was addressing. There was a -- there was -- a shifting  
7 of present actuarial risks in that market that Congress  
8 wanted to correct. And if you took the minimum coverage  
9 provision out and left the other two provisions in,  
10 there would be laid on top of the existing shifting of  
11 present actuarial risks an additional one because the  
12 uninsured would know that they would have guaranteed  
13 access to insurance whenever they became sick. It would  
14 make the -- it would make the adverse selection in that  
15 market problem even worse.

16 And so what -- and Congress, trying to come  
17 up with a market-based solution to control rates in that  
18 market, has adopted something that would -- that would  
19 work to control costs by guaranteed-issue and  
20 community-rating; but, if you -- if -- if you take out  
21 the minimum coverage, that won't work. That was  
22 Congress's assumption, again, shown by the text and  
23 legislative history of this provision. And that's why  
24 we think those things rise or fall in a package because  
25 they cut against what Congress was trying to do.

1 All of the other provisions would actually  
2 increase access to affordable care and would have  
3 advantageous effects on price. Again, Congress was  
4 invoking its traditional use of the tax code, which has  
5 long subsidized insurance through employers, has used  
6 that to impose a tax penalty on employers, to give tax  
7 credits. This is traditional stuff that Congress has  
8 done.

9 And the other thing Congress has done, those  
10 preexisting laws had their own protections for  
11 guaranteed-issue and community-rating. Effectively,  
12 within the large employer plans, they can't discriminate  
13 among people, they can't charge different rates. What  
14 Congress was doing, was doing that in the other market.  
15 If it can't, that's all that should be struck from the  
16 act.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 Mr. Kneedler.

19 Mr. Farr?

20 ORAL ARGUMENT OF H. BARTOW FARR  
21 FOR COURT-APPOINTED AMICUS CURIAE

22 MR. FARR: Mr. Chief Justice and may it  
23 please the Court:

24 At the outset, I would just like to say, I  
25 think that the government's position in this case that

1 the community-rating and guaranteed-issue provisions  
2 ought to be struck down is an example of the best  
3 driving out the good; because, even without the minimum  
4 coverage provision, those two provisions,  
5 guaranteed-issue and community-rating, will still open  
6 insurance markets to millions of people that were  
7 excluded under the prior system, and for millions of  
8 people will lower prices, which were raised high under  
9 the old system because of their poor health.

10 So even though the system is not going to  
11 work precisely as Congress wanted, it would certainly  
12 serve central goals that Congress had of expanding  
13 coverage for people who were unable to get coverage or  
14 unable to get it at affordable prices.

15 So when the government --

16 JUSTICE GINSBURG: One of the points that  
17 Mr. Kneedler made is that the price won't be affordable  
18 because -- he spoke of the adverse selection problem,  
19 that there would be so fewer people in there, the  
20 insurance companies are going to have to raise the  
21 premiums.

22 So it's nice that Congress made it possible  
23 for more people to be covered, but the reality is they  
24 won't because they won't be able to afford the premium.

25 MR. FARR: Well, Justice Ginsburg, let me

1 say two things about that.

2 First of all, when we talk about premiums  
3 becoming less affordable, it's very important to keep in  
4 mind different groups of people, because it is not  
5 something that applies accurately to everybody.

6 For people who were not able to get  
7 insurance before, obviously, their insurance beforehand  
8 was -- the price was essentially infinite. They were  
9 not able to get it at any price. They will now be able  
10 to get it at a price that they can afford.

11 For people who are unhealthy and were able  
12 to get insurance, but perhaps not for the things that  
13 they were most concerned about, or only at very high  
14 rates, their rates will be lower under the system, even  
15 without the minimum coverage provision.

16 Also, you have a large number of people who,  
17 under the Act --

18 JUSTICE SCALIA: Excuse me, why do you  
19 say -- I didn't follow that. Why?

20 MR. FARR: Because --

21 JUSTICE SCALIA: Why would their rates be  
22 lower?

23 MR. FARR: Their rates are going to be lower  
24 than they were under the prior system because they are  
25 going into a pool of people, rather than -- some of whom

1 are healthy, rather than having their rates set  
2 according to their individual health characteristics.  
3 That's why their rates were so high.

4 JUSTICE KAGAN: But the problem, Mr. Farr,  
5 isn't it, that they're going to a pool of people that  
6 will gradually get older and unhealthier. That's the  
7 way the thing works. Once you say that the insurance  
8 companies have to cover all of the sick people and all  
9 of the old people, the rates climb. More and more young  
10 people and healthy people say, why should we  
11 participate, we can just get it later when we get sick.  
12 So they leave the market, the rates go up further, more  
13 people leave the market, and the whole system crashes  
14 and burns, becomes unsustainable.

15 MR. FARR: Well --

16 JUSTICE KAGAN: And this is not --

17 MR. FARR: Certainly.

18 JUSTICE KAGAN: -- like what I think. What  
19 do I know? It's just what's reflected in Congress's  
20 findings, that it's look -- it looks at some states and  
21 says, this system crashed and burned. It looked at  
22 another state with the minimum coverage provision and  
23 said, this one seems to work. So we will package the  
24 minimum coverage provision with the nondiscrimination  
25 provisions.

1                   MR. FARR: Well, in a moment, I'd like to  
2 talk about the finding; but, if I could just postpone  
3 that for a second and talk about adverse selection  
4 itself.

5                   I think one of the misconceptions here,  
6 Justice Kagan, is that Congress, having seen the  
7 experience of the states in the '90s with  
8 community-rating and guaranteed-issue, simply imposed  
9 the minimum coverage provision as a possible way of  
10 dealing with that; and, if you don't have the minimum  
11 coverage provision, then, essentially, adverse selection  
12 runs rampant. But that's not what happened.

13                  Congress included at least half a dozen  
14 other provisions to deal with adverse selection caused  
15 by bringing in people who are less healthy into the Act.

16                  There are -- to begin with, the Act  
17 authorizes annual enrollment periods, so people can't  
18 just show up at the hospital. If they don't show up and  
19 sign up at the right time, they at least have to wait  
20 until the time next year. That's authorized by the Act.

21                  There -- with respect to the subsidies,  
22 there are three different things that make this  
23 important. First of all, the subsidies are very  
24 generous. For people below 200 percent of the federal  
25 poverty line, the subsidy will cover 80 percent, on

1 average, of the premium which makes it attractive to  
2 them to join.

3           The structure of the subsidies, because  
4 their income -- they create a floor for -- based on the  
5 income of the person getting the insurance, and then the  
6 government covers everything over that. And this is  
7 important in adverse selection because if you do have a  
8 change in the mix of people, and average premiums start  
9 to rise, the government picks up the increase in the  
10 premium. The amount that the person who is getting  
11 insured contributes remains constant at a percentage of  
12 his or her income.

13           And the third thing --

14           JUSTICE SCALIA: And there is nothing about  
15 federal support that is unsustainable, right? That is  
16 infinite.

17           MR. FARR: Well, I mean, that's a fair  
18 point, Justice Scalia; although, one of the things that  
19 happens, if you take the mandate out, while it is true  
20 that the subsidies that the government provides to any  
21 individual will increase, and they will be less  
22 efficient -- I'm not disputing that point -- actually  
23 the overall amount of the subsidies that the government  
24 will provide will decline, as the government notes  
25 itself in its brief, because there will be fewer people

1 getting them. Some people will opt out of the system  
2 even though they are getting subsidies.

3 But I would just like to go back for one  
4 more second to the point about how the subsidies are  
5 part of what Congress was using, because the other thing  
6 is that for people below 250 percent of the Federal  
7 poverty line Congress also picks up and subsidizes the  
8 out-of-pocket costs, raising the actuarial value.

9 So you have all of that, and then you have  
10 Congress also, unlike the States establishing -- or I  
11 should be precisely accurate -- almost all the States,  
12 establishing an age differential of up to three to one.  
13 So an insurance company, for example, that is selling a  
14 25-year-old a policy for \$4,000 can charge a 60-year-old  
15 \$12,000 for exactly the same coverage.

16 The States typically in the 90s when they  
17 were instituting these programs, they either had pure  
18 community rating, where everybody is charged the same  
19 premium, everybody regardless of their age is charged  
20 the same premium. Some states had a variance of 1.5 to  
21 1. Massachusetts, for example, which did have good  
22 subsidies, but their age band was two to one.

23 So when Congress is enacting this Act, it's  
24 not simply looking at the States and thinking: Well,  
25 that didn't go very well; why don't we put in a minimum

1 coverage provision; that will solve the problem.  
2 Congress did a lot of different things to try to combat  
3 the adverse selection.

4 Now, if I could turn to the finding, because  
5 I think this is the crux of the government's position  
6 and then the plaintiffs pick up on that, and then move  
7 --move from that to the rest of the Act. And it seems  
8 to me, quite honestly, it's an important part because  
9 that is textual. In this whole sort of quest for what  
10 we are trying to figure out, the finding seems to stand  
11 out as something that the Court could rely on and say  
12 here's something Congress has actually told us.

13 But I think the real problem with the  
14 finding is the context in which Congress made it. It's  
15 quite clear. If the Court wants to look, the finding is  
16 on page 42 -- 43A, excuse me, of the Solicitor General's  
17 severability brief in the appendix.

18 But the finding is made specifically in the  
19 context of interstate commerce. That is why the  
20 findings are in the Act at all. Congress wanted to  
21 indicate to the Court, knowing that the minimum coverage  
22 provision was going to be challenged, wanted to indicate  
23 to the Court the basis on which it believed it had the  
24 power under the Commerce Clause to enact this law.

25 Why does that make a difference with respect

1 to finding I, which is the one that the government is  
2 relying on, and in particular the last sentence, which  
3 says "this requirement is essential to creating  
4 effective health insurance markets in which  
5 guaranteed-issue and preexisting illnesses can be  
6 covered."

7           The reason is because the word "essential"  
8 in the Commerce Clause context doesn't have the  
9 colloquial meaning. In the Commerce Clause context  
10 "essential" effectively means useful. So that when one  
11 says in Lopez, when the Court says section 922(q) is not  
12 an essential part of a larger regulatory scheme of  
13 economic activity, it goes on to say, in which the  
14 regulatory scheme would be undercut if we didn't have  
15 this provision.

16           Well, if that's all Congress means, I agree  
17 with that. The system will be undercut somewhat if you  
18 don't have the minimum coverage provision. It's like  
19 the word "necessary" in the Necessary and Proper Clause  
20 clause. It doesn't mean, as the Court has said on  
21 numerous occasions, absolutely necessary. It means  
22 conducive to, useful, advancing the objectives,  
23 advancing the aims. And it's easy to see, I think, that  
24 that's what Congress --

25           JUSTICE SCALIA: Is there any dictionary

1     that gives that --

2                   MR. FARR:  I'm sorry, Justice Scalia?

3                   JUSTICE SCALIA:  -- that definition of  
4     "essential"?  It's very imaginative.  Just give me one  
5     dictionary.

6                   MR. FARR:  Well, but I think my point,  
7     Justice Scalia, is that they are not using it in the  
8     true dictionary sense.

9                   JUSTICE SCALIA:  How do we know that?  When  
10    people speak, I assume they are speaking English.

11                  MR. FARR:  Well, I think that there are  
12    several reasons that I would suggest that we would know  
13    that from.  The first is, as I say, the findings  
14    themselves.  Congress says at the very beginning, the  
15    head of it, is Congress makes the following findings,  
16    and they are talking about the interstate -- you know, B  
17    is headed "Effects on the national economy and  
18    interstate commerce."  So we know the context that  
19    Congress is talking about.

20                  It is more or less quoting from the Court's  
21    Commerce Clause statements.  But if one looks at the  
22    very preceding finding, which is finding H, which is on  
23    42 over onto 43, Congress at that point also uses the  
24    word "essential."  In the second sentence it says "this  
25    requirement" -- and again we're talking about the

1 minimum coverage provision -- is an essential part of  
2 this larger regulation of economic activity, which is,  
3 by the way, an exact quote from Lopez, in which "the  
4 absence of the requirement undercuts Federal  
5 regulation," also an exact quote from Lopez.

6 But what it is referring to is an  
7 essential -- an essential part of ERISA, the National  
8 Health Service Act and the Affordable Care Act. It  
9 can't possibly be, even the plaintiffs haven't argued,  
10 that those Acts would all fall in their entirety if you  
11 took out the minimum coverage provision.

12 And as a second example of the same usage by  
13 Congress, the statute that was before the Court in  
14 Raich, section 801 of Title 21, the Court said that the  
15 regulation of intrastate drug activity, drug traffic,  
16 was essential to the regulation of interstate drug  
17 activity. Again, it is simply not conceivable that  
18 Congress was saying one is so indispensable to the  
19 other, the way the United States uses the term here, so  
20 indispensable that if we can't regulate the intrastate  
21 traffic we don't want to regulate the interstate  
22 traffic, either. The whole law criminalizing drug  
23 traffic would fall.

24 So I think once you look at the finding for  
25 what I believe it says, which is we believe this is a

1 useful part of our regulatory scheme, which the Congress  
2 would think in its own approach would be sufficient --

3 JUSTICE SOTOMAYOR: Counsel, the problem I  
4 have is that you are ignoring the congressional findings  
5 and all of the evidence Congress had before it that  
6 community ratings and guaranteed-issuance would be a  
7 death spiral -- I think that was the word that was  
8 used -- without minimum coverage. Those are all of the  
9 materials that are part of the legislative record here.

10 So even if it might not be because of the  
11 structure of the Act, that's post hoc evidence. Why  
12 should we be looking at that as opposed to what Congress  
13 had before it and use "essential" in its plain meaning:  
14 You can't have minimum coverage without what the SG is  
15 arguing, community ratings and guaranteed-issue. You  
16 can't have those two without minimum coverage.

17 MR. FARR: Well, I think that's a fair  
18 question. But the idea that -- that all the information  
19 before Congress only led to the idea that you would have  
20 death spirals seems to me to be contradicted a little  
21 bit at least by the CBO report in November of 2009,  
22 which is about 4 months before the Act passed, where the  
23 CBO talks about adverse selection.

24 Now, I want to be clear. This is at a time  
25 when the minimum coverage provision was in the statute,

1 so I'm not suggesting that this is a discussion without  
2 that in it. But nonetheless, the CBO goes through and  
3 talks about adverse selection, and points out the  
4 different provisions in the Act, the ones I have  
5 mentioned plus one other, actually, where in the first 3  
6 years of the operation of the exchanges those insurance  
7 companies that get sort of a worse selection of  
8 consumers will be given essentially credits from  
9 insurance companies that get better selections.

10 JUSTICE KENNEDY: So do you want us to write  
11 an opinion saying we have concluded that there is an  
12 insignificant risk of a substantial adverse effect on  
13 the insurance companies, that's our economic conclusion,  
14 and therefore not severable? That's what you want me to  
15 say?

16 MR. FARR: It doesn't sound right the way  
17 you say it, Justice Kennedy.

18 (Laughter.)

19 MR. FARR: No, I --

20 JUSTICE SOTOMAYOR: But you don't want them  
21 to say, either, that there is a death spiral. Do you  
22 want -- you don't want us to make either of those two  
23 findings, I'm assuming?

24 MR. FARR: That's correct. Now, I agree  
25 that there is a risk and the significance of it people

1 can debate. But what I think is --is lost in that  
2 question, and I didn't mean to be whimsical about it, I  
3 think what is lost in it a little bit is what is on the  
4 other side, which is the fact that if you follow the  
5 government's suggestion, if the Court follows the  
6 government's suggestion, what is going to be lost is  
7 something we know is a central part of the Act. I mean,  
8 indeed, if one sort of looks at the legislative history  
9 more broadly, I think much of it is directed toward the  
10 idea that guaranteed- issue and community rating were  
11 the crown jewel of the Act.

12 The minimum coverage provision wasn't  
13 something that everybody was bragging about, it was  
14 something that was meant to be part of this package. I  
15 agree with that.

16 But the -- the point of it was to have  
17 guaranteed-issue and minimum coverage -- I mean, excuse  
18 me -- guaranteed-issue and community rating. And that's  
19 -- under the government's proposal, those would -- would  
20 disappear. We would go back to the old system. And  
21 under what I think is the proper severability analysis,  
22 the -- the real question the Court is asking, should be  
23 asking, is, would Congress rather go back to the old  
24 system than to take perhaps the risk that you're talking  
25 about, Justice Kennedy.

1 CHIEF JUSTICE ROBERTS: You're -- you're  
2 referring to the government's second position. Their --  
3 their first, of course, is that we shouldn't address  
4 this issue at all.

5 MR. FARR: That's correct.

6 CHIEF JUSTICE ROBERTS: I asked Mr. Kneedler  
7 about what procedure or process would be anticipated for  
8 people who are affected by the change in -- in the law,  
9 and change in the economic consequences. Do you have a  
10 view on how that could be played out? It does seem to  
11 me that if we accept your position, something -- there  
12 have to -- there has to be a broad range of  
13 consequences, whether it's additional legislation,  
14 additional litigation.

15 Any thoughts on how that's going to play  
16 out?

17 MR. FARR: Well, if the Court adopts the  
18 position that I'm advocating, Mr. Chief Justice, I think  
19 what would happen is that the Court would say that the  
20 minimum coverage provision, by hypothesis of course, is  
21 unconstitutional, and the fact of that being  
22 unconstitutional does not mean the invalidation of any  
23 other provision.

24 So under the position I'm advocating, there  
25 would no longer be challenges to the remaining part of

1 the Act. The --

2 CHIEF JUSTICE ROBERTS: But if the challenge  
3 is what we're questioning today, whether -- if you're an  
4 insurance company and you don't believe that you can  
5 give the coverage in the way Congress mandated it  
6 without the individual mandate, what -- what type of  
7 action do you bring in a court?

8 MR. FARR: You -- if the Court follows the  
9 course that I'm advocating, you do not bring an action  
10 in court, you go to Congress and you seek a change from  
11 Congress to say the minimum coverage provision has been  
12 struck down by the Court, here is our -- here -- here's  
13 the information that we have to show you what the risks  
14 are going to be. Here are the adjustments you need to  
15 make.

16 One of the questions earlier pointed out  
17 that States have adjusted their systems as they've gone  
18 along, as they've seen things work or not work.

19 You know, as I was talking earlier about the  
20 -- the different ratio for -- for ages and insurance.  
21 The States have tended to change that, because they've  
22 found that having too narrow a band worked against the  
23 effectiveness of -- of their programs. But they did --  
24 except for in Massachusetts, they didn't enact mandates.

25 So to answer -- I think to answer your

1 question directly, Mr. Chief Justice, the position I'm  
2 advocating would simply have those -- those pleas go to  
3 Congress, not in court.

4           Now, if one -- just -- just to discuss the  
5 issue more generally, if that's helpful, I -- I think  
6 that -- that if there were situations where the Court  
7 deferred -- let's say for discretionary reasons, they  
8 just said -- the Court said we're -- we're not going to  
9 take up the question of severability and therefore not  
10 resolve it in these other situations, it certainly seems  
11 to me that in enforcement actions, for example, if the  
12 time comes in -- in 2014 and somebody applies to an  
13 insurance company for a policy -- and the insurance  
14 company says, well, we're not going to issue a policy,  
15 we don't think your risks are ones that we're willing to  
16 cover, that -- it seems to me that they could sue the  
17 insurance company and the insurance company could raise  
18 as a defense that this provision, the guaranteed-issue  
19 provision of the statute, is not enforceable because it  
20 was inseverable from the decision -- from the provision  
21 that the Court held unconstitutional in 2012.

22           JUSTICE SCALIA: Mr. Farr, let's -- let's  
23 consider how -- how your approach, severing as little as  
24 possible there -- thereby increases the deference that  
25 we're showing to -- to Congress. It seems to me it puts

1 Congress in -- in this position: This Act is still in  
2 full effect. There is going to be this deficit that  
3 used to be made up by the mandatory coverage provision.  
4 All that money has to come from somewhere.

5           You can't repeal the rest of the Act because  
6 you're not going to get 60 votes in the Senate to repeal  
7 the rest. It's not a matter of enacting a new act.  
8 You've got to get 60 votes to repeal it. So the rest of  
9 the Act is going to be the law.

10           So you're just put to the choice of I guess  
11 bankrupting insurance companies and the whole system  
12 comes tumbling down, or else enacting a Federal subsidy  
13 program to the insurance companies, which is what the  
14 insurance companies would like, I'm sure.

15           Do you really think that that is somehow  
16 showing deference to Congress and -- and respecting the  
17 democratic process?

18           It seems to me it's a gross distortion of  
19 it.

20           MR. FARR: Well, Your Honor, the -- the  
21 difficulty is that it seems to me the other possibility  
22 is for the Court to make choices, particularly based on  
23 what it expects the difficulties of Congress altering  
24 the legislation after a Court ruling would be.

25           I'm not aware of any severability decision

1     that is --

2                   JUSTICE SCALIA:  No, I -- that wouldn't be  
3     my approach.  My approach would say if you take the  
4     heart out of the statute, the statute's gone.  That  
5     enables Congress to -- to do what it wants in -- in the  
6     usual fashion.  And it doesn't inject us into the  
7     process of saying, "this is good, this is bad, this is  
8     good, this is bad."

9                   It seems to me it reduces our options the  
10    most and increases Congress's the most.

11                  MR. FARR:  I guess to some extent I have to  
12    quarrel with the premise, Justice Scalia, because at  
13    least the -- the position that I'm advocating today,  
14    under which the Court would only take out the minimum  
15    coverage provision, I don't think would fit the  
16    description that you have given of taking out the heart  
17    of the statute.

18                  Now, I do think once you take out  
19    guaranteed-issue and community rating, you are getting  
20    closer to the heart of the statute.  And one of the --  
21    one of the difficulties I think with the government's  
22    position is that I think it's harder to cabin that, to  
23    draw that bright line around it.  It's harder than the  
24    government thinks it is.

25                  I mean, to begin with, even the government

1 seems to acknowledge, I think, that the exchanges are  
2 going to be relatively pale relatives of -- of the  
3 exchanges as they're intended to be, where you're going  
4 to have standardized products, everybody can come and  
5 make comparisons based on products that look more or  
6 less the same.

7 But the other thing that's going to happen  
8 is with the subsidy program. The -- the way that the  
9 subsidy program is -- is set up, the subsidy is  
10 calculated according to essentially a benchmark plan.  
11 And this -- if the Court wants to look at the  
12 provisions, they're -- they begin at page 64A of the  
13 Private Plaintiffs' brief -- again, in the appendix.  
14 The particular provision I'm talking about's at 68A, but  
15 there's a -- there's a question -- you -- you're looking  
16 essentially to calculate the premium by looking at a --  
17 at a standardized silver plan.

18 First question, obviously, is, is there  
19 going to be any such plan if you don't have  
20 guaranteed-issue and community rating, if the plans can  
21 basically be individualized? But the second problem is  
22 that, in the provision on 68A, the -- the provision  
23 that's used for calculating the subsidy, what -- what is  
24 anticipated in the provision under the -- the Act as it  
25 is now, is that you do have the floor of the income, you

1 would -- you would take this benchmark plan, and the  
2 government would pay -- pay the difference.

3 And as we talked about earlier, the  
4 benchmark plan can change for age, and -- and the  
5 provision says it can be adjusted only for age. So if  
6 in fact you even have such a thing as a benchmark plan  
7 anymore -- if the rates of people in poor health go up  
8 because of individual insurance underwriting, the  
9 government subsidy is not going to pay for that.

10 JUSTICE KAGAN: Mr. Farr, I understood that  
11 the answer that you gave to Justice Scalia was  
12 essentially that the minimum coverage provision was not  
13 the heart of the Act. Instead, the minimum coverage  
14 provision was a tool to make the nondiscrimination  
15 provisions, community rating guaranteed-issue, work.

16 So if you assume that, that all the minimum  
17 coverage is is a tool to make those provisions work,  
18 then I guess I would refocus Justice Scalia's question  
19 and say, if we know that something is just a tool to  
20 make other provisions work, shouldn't that be the case  
21 in which those other provisions are severed along with  
22 the tool?

23 MR. FARR: No. I don't think so, because  
24 there are -- there are many other tools to make the same  
25 things work. That's I think the point.

1                   And if one -- the case that comes to mind is  
2   New York v. the United States, where the Court struck  
3   down the take title provision but left other -- two  
4   other incentives essentially in place.

5                   Even without the minimum coverage provision,  
6   there will be a lot of other incentives still to bring  
7   younger people into the market and to keep them in the  
8   market. And if -- if my reading of the finding is  
9   correct, and that's all that Congress is saying, that  
10   this would be useful, it doesn't mean that it's  
11   impossible.

12                  JUSTICE BREYER: But would you -- I would  
13   just like to hear before you leave your argument, if you  
14   want to, against what Justice Scalia just said, let's  
15   assume, contrary to what you want, that the government's  
16   position is accepted by the majority of this Court. And  
17   so we now are rid, quote, of the true "heart" of the  
18   bill. Now still there are a lot of other provisions  
19   here like the Indian Act, the Black Lung Disease, the  
20   Wellness Program, that restaurants have to have a  
21   calorie count of major menus, et cetera.

22                  Now, some of them cost money. And some of  
23   them don't. And there are loads of them. Now, what is  
24   your argument that just because the heart of the bill is  
25   gone, that has nothing to do with the validity of these

1 other provisions, both those that cost money, or at  
2 least those that cost no money. Do you want to make an  
3 argument in that respect, that destroying the heart of  
4 the bill does not blow up the entire bill; it blows up  
5 the heart of the bill. I just would like to hear what  
6 you have to say about that.

7 MR. FARR: Well, Justice Breyer, I think  
8 what I would say is if one goes back to the, what I  
9 think is the proper severability standard and say, would  
10 Congress rather have not -- no bill as opposed to the  
11 bill with whatever is severed from it. It seems to me  
12 when you are talking about provisions that don't have  
13 anything to do with the minimum coverage provision,  
14 there is no reason to answer that question as any other  
15 way than yes, Congress would have wanted the --

16 JUSTICE KENNEDY: The -- the real Congress  
17 or a hypothetical Congress?

18 (Laughter.)

19 MR. FARR: An objective Congress, Your  
20 Honor, not the -- specific not with a vote count.

21 JUSTICE SCALIA: Why put -- why put Congress  
22 to that false choice?

23 MR. FARR: Well --

24 JUSTICE SCALIA: You only have two choices,  
25 Congress. You have the whole bill or you can have, you

1 can have parts of the bill or no bill at all. Why that  
2 false choice?

3 MR. FARR: I think the reason is because  
4 severability is by necessity a blunt tool. The Court  
5 doesn't have, even if it had the inclination, doesn't  
6 essentially have the authority to retool the statute --

7 JUSTICE BREYER: I would say stay out of  
8 politics. That's for Congress; not us. But the, the  
9 question here is, you've read all these cases, or  
10 dozens, have you ever found a severability case where  
11 the Court ever said: Well, the heart of the thing is  
12 gone; and, therefore, we strike down these other  
13 provisions that have nothing to do with it which could  
14 stand on their feet independently and can be funded  
15 separately or don't require money at all.

16 MR. FARR: I think the accurate answer would  
17 be, I am not aware of a modern case that says that. I  
18 think there probably are cases in the '20s and '30s that  
19 would be more like that.

20 If I could just take one second to raise the  
21 economist brief because Justice Alito raised it earlier.  
22 I just want to make one simple point. Leaving aside the  
23 whole balancing thing, if one looks at the economist  
24 brief, it's very important to note that when they are  
25 talking about one side of the balance -- if may I

1 finish.

2 CHIEF JUSTICE ROBERTS: Certainly.

3 MR. FARR: When they are talking about the  
4 balance, they are not just talking about the minimum  
5 coverage provision. They very carefully word it to say  
6 the minimum coverage provision and the subsidy programs.  
7 And then so when you are doing the mathematical  
8 balancing, the subsidy programs are extremely large.  
9 They -- in the year 2020, they are expected to be over  
10 \$100 billion in that one year alone. So if you are  
11 looking at the numbers, please consider that. Thank  
12 you.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr. Farr.  
14 Mr. Clement, you have four minutes  
15 remaining.

16 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
17 ON BEHALF OF THE PETITIONERS

18 JUSTICE SOTOMAYOR: -- Amicis' point, he  
19 says that Congress didn't go into this Act to impose  
20 minimum coverage. They went into the Act to have a  
21 different purpose, i.e., to get people coverage jury  
22 when they needed it, to increase coverage for people,  
23 but this is only a tool. But other States -- going back  
24 to my original point, that are other tools besides  
25 minimum coverage that Congress can achieve these goals.

1 So if we strike just a tool, why should we strike the  
2 whole Act, when Congress has other tools available?

3 MR. CLEMENT: Mr. Chief Justice, I will make  
4 four points in rebuttal, but I will start with Justice  
5 Sotomayor's question; which is to simply say this isn't  
6 just a tool; it's the principal tool, Congress  
7 identified it as an essential tool. It's not just a  
8 tool to make it work. It's a tool to pay for it, to  
9 make it affordable. And again, that's not my  
10 characterization; that's Congress's characterization in  
11 subfinding I on page 43a of the government's brief.

12 Now, that bring me to my first point in  
13 rebuttal, which is Mr. Kneeder says quite correctly,  
14 tells this Court, don't look at the budgetary  
15 implications. The problem with that, though, is once  
16 it's common ground, that the individual mandate is in  
17 the statute at least in part to make community rating  
18 and guaranteed-issue affordable, that really is all you  
19 have to identify. That establishes the essential link  
20 that it's there to pay for it. You don't have to figure  
21 out exactly how much that is and which box -- I mean, it  
22 clearly is a substantial part of it, because what they  
23 were trying to do was take healthy individuals and put  
24 them into the risk pool, and this is quoting their  
25 finding, which is in order -- they put people into the

1 market "which will lower premiums." So that's what  
2 their intent was.

3 So you don't have to get to the -- the final  
4 number. You know that's what was going on here, and  
5 that's reason alone to sever it.

6 Now the government -- Mr. Kneedler also says  
7 there is an easy dividing line between what they want to  
8 keep and what they want to dish out. The problem with  
9 that is that, you know, you read their brief and you  
10 might think oh, there is a guaranteed-issue and a  
11 community rating provision subtitle in the bill. There  
12 is not.

13 To figure out what they are talking about  
14 you have to go to page 6 of their brief, of their  
15 opening severability brief, where they tell you what is  
16 in and what's out. And the easy dividing line they  
17 suggest is actually between 300g(a)(1) and 300g(a)(2),  
18 because on community rating they don't -- they say that  
19 (a)(1) goes, but then they say (a)(2) has to stay,  
20 because that's the way that you'll have some sort of,  
21 kind of Potemkin community rating for the exchanges.  
22 But if you actually look at those provisions, (a)(2)  
23 makes all these references to (a)(1). It just doesn't  
24 work.

25 Now, in getting back to the -- an inquiry

1     that I think this Court actually can approach, is to  
2     look at what Congress was trying to do, you need look no  
3     further than look than the title of this statute:  
4     Patient Protection and Affordable Care. I agree with  
5     Mr. Farr that community rating and guaranteed-issue were  
6     the crown jewels of this Act. They were what was trying  
7     to provide patient protection. And what made it  
8     affordable? The individual mandate. If you strike down  
9     guaranteed-issue, community rating and the individual  
10    mandate, there is nothing left to the heart of the Act.

11           And that takes me to my last point, which is  
12    simply this court in Buckley created a halfway house and  
13    it took Congress 40 years to try to deal with the  
14    situation, when contrary to any time of their intent,  
15    they had to try to figure out what are we going to do  
16    when we are stuck with this ban on contributions, but we  
17    can't get at expenditures because the Court told us we  
18    couldn't? And for 40 years they worked in that halfway  
19    house. Why make them do that in health care? The  
20    choice is to give Congress the task of fixing this  
21    statute, the residuum of this statute after some of it  
22    is struck down, or giving them the task of simply fixing  
23    the problem on a clean slate. I don't think that is a  
24    close choice. If the individual mandate is  
25    unconstitutional, the rest of the Act should fall.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 Mr. Clement.

3 Mr. Farr, you were invited by this Court to  
4 brief and argue in these cases in support of the  
5 decision below on severability. You have ably carried  
6 out responsibility for which we are grateful.

7 Case Number 11-393 is submitted. We will  
8 continue argument in Case Number 11-400 this afternoon.

9 (Whereupon, at 11:49 a.m., the case in the  
10 above-entitled matter was submitted.)

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will continue  
4 argument this afternoon in case 11-400  
5 Florida v. Department of Health and Human Services.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and may it  
10 please the Court:

11 The constitutionality of the Act's massive  
12 expansion of Medicaid depends on the answer to two  
13 related questions: First is the expansion coercive and  
14 second does that coercion matter.

15 JUSTICE KAGAN: Mr. Clement, can I ask you  
16 just a matter of clarification? Would you be making the  
17 same argument if instead of the Federal government  
18 picked up 90 percent of the cost the Federal government  
19 picked up 100 percent of the cost.

20 MR. CLEMENT: Justice Kagan, if everything  
21 else in the statute remained the same, I would be making  
22 the exact same argument.

23 JUSTICE KAGAN: The exact same argument. So  
24 that really reduces to the question of why is a big gift  
25 from the Federal government a matter of coercion? In

1 other words, the Federal government is here saying, we  
2 are giving you a boatload of money. There are no --  
3 there's no matching funds requirement, there are no  
4 extraneous conditions attached to it, it's just a  
5 boatload of Federal money for you to take and spend on  
6 poor people's healthcare. It doesn't sound coercive to  
7 me, I have to tell you.

8 MR. CLEMENT: Well, Justice Kagan, let me --  
9 I mean, I eventually want to make a point where even if  
10 you had a stand alone program that just gave  
11 100 percent, again 100 percent boatload, nothing but  
12 boat load -- well, there would still be a problem.

13 JUSTICE KAGAN: And you do make that  
14 argument in your brief, just a stand alone program, a  
15 boatload of money, no extraneous conditions, no matching  
16 funds, is coercive?

17 MR. CLEMENT: It is. But before I make that  
18 point, can I simply say you built into your question the  
19 idea that there are no conditions. And of course, when  
20 you first asked it was what about the same program with  
21 100 percent matching on the newly eligible mandatory  
22 individuals, which is how the statute refers to them.  
23 And that would have a very big condition. And the very  
24 big condition is that the States in order to get that  
25 new money, they would have to agree not only to the new

1 conditions but the government here is -- the Congress is  
2 leveraging their entire prior participation in the  
3 program --

4 JUSTICE KAGAN: Well, let me give you a  
5 hypothetical, Mr. Clement.

6 MR. CLEMENT: Sure.

7 JUSTICE KAGAN: Now, suppose I'm an employer  
8 and I see somebody I really like and I want to hire that  
9 person. And I say Im going to give you \$10 million a  
10 year to come work for me. And the person says well, I  
11 -- you know, I've never been offered anywhere  
12 approaching \$10 million a year, of course I'm going to  
13 say yes to that. Now we would both be agreed that  
14 that's not coercive, right.

15 MR. CLEMENT: Well, I guess I would want to  
16 know where the money came from. And if the money came  
17 from --

18 JUSTICE KAGAN: Wow, wow. I'm offering you  
19 \$10 million a year to come work for me and you are  
20 saying this is anything but a great choice?

21 MR. CLEMENT: Sure, if I told you actually  
22 it came from my own bank account. And that's what's  
23 really going on here in part. And that's why it's not  
24 --

25 JUSTICE KAGAN: But, Mr. Clement -- Mr.

1 Clement, can that possibly be. When a taxpayer pays  
2 taxes to the Federal government, the person is acting as  
3 a citizen of the United States. When a taxpayer pays  
4 taxes to New York, a person is acting as a citizen of  
5 New York. And New York could no more tell the Federal  
6 government what to do with the Federal government's  
7 money than the Federal government can tell New York what  
8 to do with the moneys that New York is collecting.

9 MR. CLEMENT: Right. And if New York and  
10 the United States figured out a way to tax individuals  
11 at greater than 100 percent of their income then maybe  
12 you could just say it's two separate sovereigns and two  
13 separate taxes. But we all know that in the real world  
14 that to the extent that the Federal government continues  
15 to increase taxes that decreases the ability of the  
16 States to tax their own citizenry and it's a real  
17 tradeoff.

18 JUSTICE SOTOMAYOR: Well, I would admit on  
19 the Federal government's power to tax.

20 MR. CLEMENT: What's that.

21 JUSTICE SOTOMAYOR: Are you suggesting that  
22 at a certain point the States would have a claim against  
23 the Federal government raising their taxes because  
24 somehow the States will feel coerced to lower their tax  
25 rate?

1 MR. CLEMENT: No, Justice Sotomayor, I'm  
2 not. What I'm suggesting is that it's not simply the  
3 case that you can say, well, it's free money, so we  
4 don't even have to ask whether the program's coercive.

5 JUSTICE SOTOMAYOR: Now, counsel, what  
6 percentage does it become coercive? Meaning, as I look  
7 at the figures I've seen from amici, there are some  
8 states for whom the percentage of Medicaid funding to  
9 their budget is close to 40 percent, but there are  
10 others that are less than 10 percent.

11 And you say, across the board this is  
12 coercive because no state, even at 10 percent, can give  
13 it up. What's the percentage of big gift that the  
14 federal government can give? Because what you're saying  
15 to me is, for a bankrupt state, there's no gift the  
16 federal government could give them ever, because it can  
17 only give them money without conditions.

18 No matter how poorly the state is run, no  
19 matter how much the federal government doesn't want to  
20 subsidize abortions or doesn't want to subsidize some  
21 other state obligation, the federal government can't  
22 give them 100 percent of their needs.

23 MR. CLEMENT: And, Justice Sotomayor, I'm  
24 really saying the opposite, which is not that every gift  
25 is coercive, no matter what the amount, no matter how

1 small. I'm saying essentially the opposite, which is  
2 there has to be some limit. There has to be some limit  
3 on coercion.

4 And the reason is quite simple, because this  
5 Court's entire spending power jurisprudence is premised  
6 on the notion that spending power is different, and that  
7 Congress can do things pursuant to the spending power  
8 that it can't do pursuant to its other enumerated powers  
9 precisely because the programs are voluntary. And if  
10 you relax that assumption that the programs are  
11 voluntary, and you are saying they are coercion, then  
12 you can't have the spending power jurisprudence --

13 JUSTICE SOTOMAYOR: What makes them  
14 coercive; that the state doesn't want to face its voters  
15 and say, instead of taking 10, 20, 30, 40 percent of the  
16 government's offer of our budget and paying for it  
17 ourselves and giving up money for some other function?  
18 That's what makes it coercive --

19 MR. CLEMENT: Well --

20 JUSTICE SOTOMAYOR: -- that the state is  
21 unwilling to say that?

22 MR. CLEMENT: Maybe I can talk about what  
23 makes it coercive by talking about the actual statute at  
24 issue here and focusing on what I think are the three  
25 hallmarks of this statute that make it uniquely

1 coercive.

2                   One of them is the fact that this statute is  
3 tied to the decidedly nonvoluntary individual mandate.  
4 And that makes this unique, but it makes it significant,  
5 I think.

6                   I will continue. I thought you had a  
7 question. I'm sorry.

8                   The second factor, of course, is the fact  
9 that Congress here made a distinct and conscious  
10 decision to tie the state's willingness to accept these  
11 new funds, not just to the new funds but to their entire  
12 participation in the statute, even though the coverage  
13 for these newly eligible individuals is segregated from  
14 the rest of the program. And this is section 2001A3 at  
15 page 23A of the appendix to the blue brief.

16                  JUSTICE GINSBURG: Isn't that true of every  
17 Medicaid increase? That each time -- I mean, and this  
18 started quite many years ago, and Congress has added  
19 more people and given more benefits -- and every time,  
20 the condition is, if you want the Medicaid program, this  
21 is the program, take it or leave it.

22                  MR. CLEMENT: No, Justice Ginsburg, this is  
23 distinct in two different directions. One is, in some  
24 of the prior expansions of the program, but not all,  
25 Congress has made covering newly eligible individuals

1    totally voluntary.  If the states wants to cover the  
2    newly eligible individuals, they will get the money;  
3    but, if they don't, they don't risk any of their  
4    existing participation programs.

5                    The 1972 program was a paradigm of that.  It  
6    created this 209(b) option for states to participate.  
7    This court talked about it in the Gray Panthers case.

8                    There were other expansions that have taken  
9    place, such as the 1984 expansions, where they didn't  
10   give states that option; but, here's the second  
11   dimension in which this is distinct, which is, here,  
12   Congress has created a separate part of the program for  
13   the newly eligible mandatory individuals.  That's what  
14   they called them.

15                   And those individuals are treated separately  
16   from the rest of the program going forward forever.  
17   They are going to be reimbursed at a different rate from  
18   everybody who's covered under the preexisting program.

19                   Now, in light of that separation by Congress  
20   itself of the newly eligible individuals from the rest  
21   of the program, it's very hard to understand Congress's  
22   decision to say, look if you don't want to cover these  
23   newly eligible individuals, you don't just not get the  
24   new money, you don't get any of the money under the --

25                   JUSTICE BREYER:  Where does it say that?

1 I'm sorry, where does it say that?

2 MR. CLEMENT: It says -- well, it -- where  
3 does it say what, Justice Breyer?

4 JUSTICE BREYER: What you just said. You  
5 said, Congress said, if you don't take the new money to  
6 cover the new individuals, you don't get any of the old  
7 money that covers the old individuals. That's what I  
8 heard you say.

9 MR. CLEMENT: Right.

10 JUSTICE BREYER: And where does it say that?

11 MR. CLEMENT: It says it -- there's two  
12 places where it says it.

13 JUSTICE BREYER: Yeah, where?

14 MR. CLEMENT: The 2001A3 makes it part of my  
15 brief.

16 JUSTICE BREYER: Where is it in your brief?

17 MR. CLEMENT: That's at page 23 A --

18 JUSTICE BREYER: In the blue brief?

19 MR. CLEMENT: Blue brief.

20 JUSTICE BREYER: 23A. Okay. Thank you.

21 MR. CLEMENT: And this makes not the point  
22 about the funding cutoff. This makes the point just  
23 that these newly eligible individuals are really treated  
24 separately forevermore.

25 JUSTICE BREYER: I want the part about the

1 funding cutoff.

2 MR. CLEMENT: Right. And there,

3 Justice Breyer --

4 JUSTICE BREYER: And that cite section is  
5 what?

6 MR. CLEMENT: I don't have that with me --

7 JUSTICE BREYER: Well, I have it in front of  
8 me.

9 MR. CLEMENT: Great. Perfect. Thank you.

10 JUSTICE BREYER: And I will tell you what I  
11 have, what I have in front of me, what it says.

12 MR. CLEMENT: Right.

13 JUSTICE BREYER: And it's been in the  
14 statute since 1965.

15 MR. CLEMENT: Exactly.

16 JUSTICE BREYER: And the cite I have is  
17 42 U.S.C. Section 1396(c). So are we talking about the  
18 same thing?

19 MR. CLEMENT: If that's the -- if that is  
20 the provision that gives the secretary --

21 JUSTICE BREYER: Yeah, okay.

22 MR. CLEMENT: -- among other things --

23 JUSTICE BREYER: And here's what it says at  
24 the end.

25 MR. CLEMENT: -- the authority to cut off

1 all participation in the program, yes.

2 JUSTICE BREYER: It says, "The secretary  
3 shall notify the state agency" -- this is if they don't  
4 comply -- "that further payments will not be made to the  
5 state or, in his discretion, that payments will be  
6 limited to categories under or parts of the state plan  
7 not affected by such failure, which it repeats until the  
8 secretary is satisfied that he shall limit payments to  
9 categories under or parts of the state plan not affected  
10 by such failure."

11 So, reading that in your favor, I read that  
12 to say, it's up to the secretary whether, should a state  
13 refuse to fund the new people, the secretary will cut  
14 off funding for the new people, as it's obvious the  
15 state doesn't want it, and whether the secretary can go  
16 further. I also should think -- I could not find one  
17 case where the secretary ever did go further, but I also  
18 would think that the secretary could not go further  
19 where going further would be an unreasonable thing to  
20 do, since government action is governed by the  
21 Administrative Procedure Act, since it's governed by the  
22 general principle, it must always be reasonable.

23 So I want to know where this idea came from  
24 that should state X say, "I don't want the new money,"  
25 that the secretary would or could cut off the old money?

1 MR. CLEMENT: And, Justice Breyer, here's  
2 where it comes from, which is from the very beginning of  
3 this litigation, we've pointed out that what's coercive  
4 is not the absolute guarantee that the secretary could  
5 cut off every penny, but the fact that she could.

6 JUSTICE BREYER: All right. Now, let me  
7 relieve you of that concern, and tell me whether I have.  
8 That a basic principle of administrative law, indeed,  
9 all law, is that the government must act reasonably.  
10 And should a secretary cut off more money than the  
11 secretary could show was justified by being causally  
12 related to the state's refusal to take the new money,  
13 you would march into court with your clients and say,  
14 "Judge, the secretary here is acting unreasonably, and I  
15 believe there is implicit in this statute, as there is  
16 explicit in the ADA, that any such cut-off decision must  
17 be reasonable."

18 Now, does that relieve you of your fear?

19 MR. CLEMENT: It doesn't for this reason,  
20 Justice --

21 JUSTICE BREYER: I didn't think it would.

22 MR. CLEMENT: Well, but here's the reason.  
23 Here's the reason, Justice Breyer, it doesn't.

24 One is, I mean, I don't know the opinion to  
25 cite for that proposition.

1           Second is, we have been making in this  
2   litigation since the very beginning this basic point,  
3   the government has had opportunities at every level of  
4   this system, and I suppose they will have an opportunity  
5   today to say, "fear not, States, if you don't want to  
6   take the new conditions, all you will lose is the new  
7   money."

8           JUSTICE BREYER:   And I said -- I said  
9   because it could be, you know, given the complexity of  
10   the act, that there is some money that would be saved in  
11   the program if the States take the new money, and if  
12   they don't take the new money there is money that is  
13   being spent that wouldn't otherwise be spent.   There  
14   could be some pile like that.

15           It might be that the secretary could show it  
16   was reasonable to take that money away from the states,  
17   too.

18           JUSTICE SCALIA:   Mr. Clement --

19           JUSTICE BREYER:   But my point is, you have  
20   to show reasonableness before you can act.

21           JUSTICE SCALIA:   -- do you agree -- do you  
22   agree that the government has to act reasonably?   Do we  
23   strike down unreasonable statutes?   My God.

24           MR. CLEMENT:   And, Justice Scalia, I mean --

25           JUSTICE SCALIA:   The executive has to act

1 reasonably, that's certain, in implementing a statute;  
2 but, if the statute says, in so many words, that the  
3 secretary can strike the whole -- funding for the whole  
4 program, that's the law, unreasonable or not, isn't it?

5 MR. CLEMENT: That's the way I would read  
6 the law, Your Honor.

7 JUSTICE BREYER: Yeah, but I have a  
8 number -- all right.

9 MR. CLEMENT: And if I could just add one  
10 thing just to the discussion is the point that, you  
11 know, this is not all hypothetical. I mean, in -- there  
12 was a record in the district court, and there is an  
13 Exhibit 33 to our motion to summary judgment. It is not  
14 in the joint appendix. We can lodge it with the Court  
15 if you'd like. But it's a letter in the record in this  
16 litigation, and it's a letter from the secretary to  
17 Arizona, when Arizona floated the idea that it would  
18 like to withdraw from the CHIP program, which is a  
19 relatively small part of the whole program.

20 And what Arizona was told by the secretary  
21 is that if you withdraw from the CHIP program, you risk  
22 losing \$7.8 billion, the entirety of your Medicaid  
23 participation. So this is not something that we've  
24 conjured up --

25 JUSTICE BREYER: All right.

1 JUSTICE KAGAN: Mr. Clement --

2 JUSTICE BREYER: To make you feel a little  
3 better, I want to pursue this for one more minute.  
4 There are cases and many, of which Justice Scalia knows  
5 as well, which uses the Holy Hill, uses the same word as  
6 this statute: In the Secretary's discretion. And in  
7 those cases this Court has said, that doesn't mean the  
8 Secretary can do anything that he or she wants, but  
9 rather, they are limited to what is not arbitrary,  
10 capricious, and abuse of discretion in interpreting  
11 statutes, in applying those statutes, et cetera. End of  
12 my argument; end of my question. Respond as you wish.

13 (Laughter.)

14 MR. CLEMENT: Well, Justice Breyer, I'm not  
15 sure that the Court's federalism jurisprudence should  
16 force States to defend on how a lower court reads Holy  
17 Hill. I think that really right here what we know to an  
18 absolute certainty is that this Secretary -- this  
19 statute gives the Secretary the right to remove all of  
20 the State's funding under these programs. Think about  
21 what that is, just --

22 JUSTICE SOTOMAYOR: Mr. Clement, do you  
23 think that the Federal Government couldn't, if it chose,  
24 Congress, say, this system doesn't work. We are just  
25 simply going to rehaul it. It is not consistent with

1    how -- what we want to accomplish.  We're just going to  
2    do away with the system and start a new health care plan  
3    of some sort.  And States, you can take the new plan,  
4    you can leave them.  We are going to give out 20 percent  
5    less, maybe 20 percent more, depending on what Congress  
6    chooses.

7                   Can Congress do that?  Does it have to  
8    continue the old system because that is what the States  
9    are relying upon and it's coercive now to give them a  
10   new system?

11                  MR. CLEMENT:  Justice Sotomayor, we are not  
12   saying we have a vested right to participate in the  
13   Medicaid program as it exists now.  So if Congress  
14   wanted to scrap the current system and have a new one,  
15   I'm not going to tell you that there is no possibility  
16   of a coercion challenge to it, but I'm not going to  
17   say --

18                  JUSTICE SOTOMAYOR:  That's what I -- I want  
19   to know how I draw the line, meaning --

20                  MR. CLEMENT:  Well, can --

21                  JUSTICE SOTOMAYOR:  -- I think the usual  
22   definition of coercion is, I don't have a choice.  I'm  
23   not sure what -- why it's not a choice for the States.  
24   They may not pay for something else.  If they don't take  
25   Medicaid and they want to keep the same level of

1 coverage, they may have to make cuts in their budget to  
2 other services they provide. That's a political choice  
3 of whether they choose to do that or not.

4 But when have we defined the right or  
5 limited the right of government not to spend money in  
6 the ways that it thinks appropriate?

7 MR. CLEMENT: Well, Justice Sotomayor,  
8 before -- I mean, I will try to answer that question,  
9 too. But the first part of the question was, what if  
10 Congress just tried to scrap this and start over again  
11 with a new program?

12 Here's why this is fundamentally different  
13 and why it's fundamentally more coercive, because  
14 Congress is not saying we want to scrap this program.  
15 They don't have a single complaint, really, with the way  
16 that States are providing services to the visually  
17 impaired and the disabled under pre-existing Medicaid.  
18 And that's why it's particularly questionable why they  
19 are saying that if you don't take our new money subject  
20 to the new conditions, we are going to take all of the  
21 money you have previously gotten, that you have been  
22 dependent on for 45 years and you are using right now to  
23 serve the visually impaired and the disabled --

24 JUSTICE GINSBURG: Mr. Clement, may I -- may  
25 I ask you -- question another line. You represent,

1     what, 26 States?

2                     MR. CLEMENT:   That's right, Justice  
3     Ginsburg.

4                     JUSTICE GINSBURG:   And we are also told that  
5     there are other States that like this expansion and they  
6     are very glad to have it.   The relief that you are  
7     seeking is to say the whole expansion is no good, never  
8     mind that there are States that say, we don't feel  
9     coerced, we think this is good.

10                    You are -- you are saying that because you  
11    represent a sizeable number of States, you can destroy  
12    this whole program, even though there may be as many  
13    States that want it, that don't feel coerced, the  
14    States, thinking that this is a good thing?

15                    MR. CLEMENT:   Justice Ginsburg, that's  
16    right, but that shouldn't be a terrible concern, because  
17    if Congress wants to do what it did in 1972, and pass a  
18    statute that makes the expansion voluntary, every State  
19    that thinks that this is a great deal can sign up.

20                    What's telling here, though, is 26 States,  
21    who think that this is a bad deal for them, actually are  
22    also saying that they have no choice but to take this  
23    because they can't afford to have their entire  
24    participation in this 45-year-old program wiped out, and  
25    they have to go back to square one and figure out how

1 they are going to deal with the visually impaired in  
2 their State, the disabled in their State --

3 JUSTICE SCALIA: Mr. Clement, I didn't take  
4 the time to figure this out, but maybe you did. Is  
5 there any chance at all that 26 States opposing it have  
6 Republican governors and all of the states supporting it  
7 have Democratic governors? Is that possible?

8 MR. CLEMENT: There's a correlation,  
9 Justice Scalia.

10 JUSTICE SCALIA: Yes.

11 (Laughter.)

12 JUSTICE GINSBURG: Let -- let me ask you  
13 another thing, Mr. -- Mr. Clement. Most colleges and  
14 universities are heavily dependent on the government to  
15 fund their research programs and other things. And that  
16 has been going on for a long time. And then Title IX  
17 passes, and a government official comes around and  
18 say -- says to the colleges, you want money for your  
19 physics labs and all the other things you get it for,  
20 then you have to create an athletic program for girls.  
21 And the recipient says, I am being coerced, there is no  
22 way in the world I can give up all the funds to run all  
23 these labs that we have, I can't give it up, so I'm  
24 being coerced to accept this program that I don't want.  
25 Why doesn't your theory, if your theory is

1 any good, why doesn't it work any time, something --  
2 someone receives something that is too good to give up?

3 MR. CLEMENT: Well, Justice Ginsburg, there  
4 is two reasons that might be different. One is this  
5 whole line of coercion only applies -- is only relevant,  
6 really, when Congress tries to do something through the  
7 spending power it couldn't do directly. So if Congress  
8 tried to impose Title IX directly, I guess the question  
9 for this Court would be whether or not Section 5 of the  
10 14th Amendment allowed Congress to do that?

11 I imagine you might think that it did and I  
12 imagine some of your colleagues might take issue with  
13 that, but that's -- that's the nature of the question.  
14 So one way around that would be if Congress can do it  
15 directly, you don't even have to ask whether there is  
16 something special about the spending power. That's how  
17 this Court resolved, for example, the Ferra case about  
18 funding to -- to colleges.

19 JUSTICE GINSBURG: I'm trying to understand  
20 your coercion theory. I know that there are cases of  
21 ours that have said there is a line between pressure and  
22 coercion, but we have never had, in the history of this  
23 country or the Court, any Federal program struck down  
24 because it was so good that it becomes coercive to be in  
25 it.

1                   MR. CLEMENT: Well, Justice Ginsburg, I'm  
2 going -- to say the second thing about my answer to your  
3 prior question was just, I also think that, you know, it  
4 may be that spending on certain private universities is  
5 something again that Congress can do, and it doesn't  
6 matter whether it's coercion, but when they are trying  
7 to get the States to expand their Medicaid programs,  
8 that's --

9                   JUSTICE GINSBURG: Let's take -- let's take  
10 public colleges.

11                  MR. CLEMENT: Okay. Then there -- then  
12 there may be some limits on that -- I mean, but again,  
13 I'm not sure even in that context there might not be  
14 some things Congress can do. It's a separate question.

15                  But once we take a premise, which I don't  
16 think there is a disagreement here, that Congress could  
17 not simply as a matter of direct legislation under the  
18 commerce power or something say, States, you must expand  
19 your Medicaid programs. If we take that as a given,  
20 then I think we have to ask the question about whether  
21 or not it's coercive.

22                  Now, you -- in your second question you ask,  
23 well, you know, I mean, where's the case that says that  
24 we've crossed that line. And this is that case, I would  
25 respectfully say.

1 JUSTICE BREYER: Then the government can  
2 reply as well to the 1980 extension to children 0 to  
3 6 years old, 1990 requiring the extension for children  
4 up to 18, all those prior extensions to me seem just as  
5 big in amount, just about as big in the number of people  
6 coming on the rolls, and they are all governed by  
7 precisely the same statute that you are complaining of  
8 here, which has been in the law since '65.

9 MR. CLEMENT: Justice Breyer, I don't think  
10 that our position here would necessarily extend to say  
11 the 1984 amendments, and let me tell you why. You know,  
12 I'm -- I'm I am not saying that absolutely that's  
13 guaranteed that's not coercive, but here's reasons why  
14 they're different.

15 The one major difference is of the size of  
16 the program. I mean, the expansion of Medicaid since  
17 1984 is really breathtaking. Medicaid, circa, 1984 the  
18 Federal spending to the States was a shade over  
19 \$21 billion. Right now it's \$250 billion, and that's  
20 before the expansion under this statute.

21 JUSTICE KAGAN: Well, if you are right, Mr.  
22 Clement, doesn't that mean that Medicaid is  
23 unconstitutional now?

24 MR. CLEMENT: Not necessarily, Justice  
25 Kagan. And again, it's because we are not here with a

1 one trick pony. One of the factors -- we point you to  
2 three factors that make this statute uniquely coercive.  
3 One of them is the sheer size of this program. And, you  
4 know, if you want a gauge on the size of this program,  
5 the best place to look is the government's own number.  
6 Footnote 6, page 73 --

7 JUSTICE KAGAN: So, when does a program  
8 become too big? I want you to give me a dollar number.

9 MR. CLEMENT: \$3.3 trillion over the next 10  
10 years. That's -- that --

11 JUSTICE BREYER: I'll tell you this number,  
12 which I did look up, that the amount, approximately, if  
13 you look into it -- as a percentage of GDP, it's big,  
14 but it was before this somewhere about 2-point-something  
15 percent, fairly low, of GDP. It'll go up to something a  
16 little bit over 3 percent of GDP. And now go look at  
17 the comparable numbers, which I did look at, with the  
18 expansion that we're talking about before.

19 The expansion from 0 to 18 or even from 0 to  
20 6. And while you can argue those numbers, it's pretty  
21 hard to argue that they aren't roughly comparable as a  
22 percentage of the prior program or as a percentage of  
23 GDP.

24 If I'm right on those numbers or even  
25 roughly right -- I don't guarantee them -- then would

1     you have to say, well, indeed, Medicaid has been  
2     unconstitutional since 1964.

3                     And if not, why not?

4                     MR. CLEMENT: The answer is no, and that's  
5     because we're here saying there are three things that  
6     make this statute unique.

7                     JUSTICE SCALIA: What are your second and  
8     third? I'm on pins and needles to hear your --

9                     (Laughter.)

10                    MR. CLEMENT: One is the sheer size. Two is  
11    the fact that this statute uniquely is tied to an  
12    individual mandate which is decidedly nonvoluntary. And  
13    three is the fact that they've leveraged the prior  
14    participation in the program, notwithstanding that  
15    they've broken this out as a separately segregated fund  
16    going forward, which is not --

17                    JUSTICE KAGAN: So on the third -- on the  
18    third, suppose you had the current program and Congress  
19    wakes up tomorrow and says "we think that there's too  
20    much fraud and abuse in the program, and we're going to  
21    put some new conditions on how the States use this money  
22    so we can prevent fraud and abuse, and we're going to  
23    tie it to everything that's been there initially."

24                    Unconstitutional?

25                    MR. CLEMENT: No, I think that is

1 constitutional because I think that's something that  
2 Congress could do directly. It wouldn't have to limit  
3 that to the spending program. And I think 18 U.S.C. 666  
4 is -- is a statute -- it's in the criminal code, it may  
5 be tied to spending, but I think that's -- that's a  
6 provision that I don't think it's constitutional; I  
7 think it's called into question.

8 JUSTICE KAGAN: I guess I don't get the  
9 idea. I mean, Congress can legislate fraud and abuse  
10 restrictions in Medicaid, and Congress can legislate  
11 coverage expansions in Medicaid.

12 MR. CLEMENT: Well, Justice Kagan, I think  
13 there's a difference, but if I'm wrong about that and  
14 the consequence is that Congress has to break Medicaid  
15 down into remotely manageable pieces as opposed to  
16 \$3.3 trillion over 10 years before the expansion, I  
17 don't think that would be the end of the world. But I  
18 really would ask you to focus on specifically what's  
19 going on here, which is they take these newly eligible  
20 people -- and that's a massive change in the way the  
21 program works.

22 These are people who are healthy, childless  
23 adults who are not covered in many States. They say  
24 okay, we're going to make you cover those. We're going  
25 to have a separate program for how you get reimbursed

1 for that. You get reimbursed differently from all the  
2 previously eligible individuals. But if you don't take  
3 our money, we're going to take away your participation  
4 in the program for the visually impaired and disabled.

5 If I may reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Well, I'm -- I'm not  
7 sure my colleagues have exhausted their questions, so --

8 JUSTICE SOTOMAYOR: I guess my greatest  
9 fear, Mr. Clement, with your argument is the following:  
10 The bigger the problem, the more resources it needs.  
11 We're going to tie the hands of the Federal government  
12 in choosing how to structure a cooperative relationship  
13 with the States. We're going to say to the Federal  
14 government, the bigger the problem, the less your powers  
15 are. Because once you give that much money, you can't  
16 structure the program the way you want.

17 It's our money, Federal government. We're  
18 going to have to run the program ourselves to protect all  
19 our interests. I don't see where to draw that line.  
20 The uninsured are a problem for States only because  
21 they, too, politically, just like the Federal  
22 government, can't let the poor die. And so to the  
23 extent they don't want to do that, it's because they  
24 feel accountable to their citizenry. And so if they  
25 want to do it their way, they have to spend the money to

1 do it their way, if they don't want to do it the Federal  
2 way.

3 So I -- I just don't understand the logic of  
4 saying States, you can't -- you don't -- you're not  
5 entitled to our money, but once you start taking it, the  
6 more you take, the more power you have.

7 MR. CLEMENT: Well, Justice Sotomayor, a  
8 couple of points. One is, I actually think that sort of  
9 misdescribes what happened with Medicaid. I mean,  
10 States were, as you suggest, providing for the poor and  
11 the visually impaired and disabled even before Medicaid  
12 came along. Then all of a sudden, States -- the Federal  
13 government says look, we'd like to help you with that,  
14 and we're going to give you money voluntarily. And then  
15 over time, they give more money with more conditions,  
16 and now they decide they're going to totally expand the  
17 program, and they say that you have to give up even your  
18 prior program, where we -- first came in and offered you  
19 cooperation, we're now going to say you have to give  
20 that up if you don't take our new conditions.

21 Secondly, I do think that our principle  
22 is not that when you get past a certain level, it  
23 automatically becomes coercive per se. But I do think  
24 when you get a program and you're basically telling  
25 States that look, we're going to take away \$3.3 trillion

1 over the next 10 years, that at that point, it's okay to  
2 insist that Congress be a little more careful that it  
3 not be so aggressively coercive as it was in this  
4 statute.

5 And I would simply say that -- we're not  
6 here to tell you that this is going to be an area where  
7 it's going to be very easy to draw the line. We're just  
8 telling you that it's inceptionally important to draw  
9 that line, and this is a case where it ought to be easy  
10 to establish a beachhead, say that coercion matters, say  
11 there's three factors of this particular statute that  
12 make it as obviously coercive as any piece of  
13 legislation that you've ever seen, and then you will  
14 have effectively instructed Congress that there are  
15 limits, and you have laid down some administrable rules.

16 JUSTICE SCALIA: Mr. Clement, the Chief has  
17 said I can ask this.

18 CHIEF JUSTICE ROBERTS: He doesn't always  
19 check first.

20 (Laughter.)

21 JUSTICE SCALIA: As I recall your -- your  
22 theory, it is that to determine whether something is  
23 coercive, you look to only one side, how much you're  
24 threatened with losing or offered to receive. And the  
25 other side doesn't matter.

1           I don't think that's realistic. I mean, I  
2   think, you know, the -- the old Jack Benny thing, Your  
3   Money Or Your Life, and, you know, he says "I'm  
4   thinking, I'm thinking." It's -- it's funny, because  
5   it's no choice. You know? Your life? Again, it's just  
6   money. It's an easy choice. No coercion, right? I  
7   mean -- right?

8           Now whereas, if -- if the choice were your  
9   life or your wife's, that's a lot harder.

10          Now, is it -- is it coercive in both  
11   situations?

12          MR. CLEMENT: Well, yes. It is.

13          (Laughter.)

14          JUSTICE SCALIA: Really?

15          MR. CLEMENT: I would say that.

16          JUSTICE SCALIA: It's a tough choice.

17   And -- and --

18          JUSTICE KENNEDY: I thought you were going  
19   to say "this is your money and your life."

20          (Laughter.)

21          MR. CLEMENT: And well -- it is. But I  
22   mean -- I might have missed something, but both of those  
23   seem to be coercion.

24          (Laughter.)

25          JUSTICE SCALIA: No, no, no. To say -- to

1 say you're -- when you say you're coerced, it means  
2 you've been -- you've been given an offer you can't  
3 refuse. Okay? You can't refuse your money or your  
4 life. But your life or your wife's, I could refuse that  
5 one.

6 (Laughter.)

7 JUSTICE SOTOMAYOR: He's not going home  
8 tonight.

9 CHIEF JUSTICE ROBERTS: Let's leave the wife  
10 out of this --

11 JUSTICE SCALIA: I'm talking about my life.  
12 I think -- take mine, you know?

13 (Laughter.)

14 MR. CLEMENT: I wouldn't do that either,  
15 Judge.

16 JUSTICE SCALIA: I won't use that as an  
17 example.

18 Forget about it.

19 CHIEF JUSTICE ROBERTS: That's enough  
20 frivolity for a while.

21 But I want to make sure I understand where  
22 the meaningfulness of the choice is taken away, is it  
23 the amount that's being offered, that it's just so much  
24 money, of course you can't turn it down, or is it the  
25 amount that's going to be taken away if you don't take

1     what they're offering?

2                   MR. CLEMENT:   It's both, Your Honor.   And I  
3     think that that's -- I mean, there really is -- I --  
4     there really is, you know, three strings in this bow.   I  
5     mean, one is, the sheer amount of money here makes it  
6     very, very difficult to refuse, because it's not money  
7     that, you know, that's come from some -- you know, China  
8     or, you know, the -- the -- the export tariffs like in  
9     the old day.   It's coming from the taxpayers, so that's  
10    part of it.

11                   The fact that they're being asked to give up  
12    their continuing participation in a program that they've  
13    been participating in for 45 years as a condition to  
14    accept the new program, we think that's the second thing  
15    that's critical --

16                   CHIEF JUSTICE ROBERTS:   Well, why isn't that  
17    a consequence of how willing they have been since the  
18    New Deal to take the Federal government's money?   And it  
19    seems to me that they have compromised their status as  
20    independent sovereigns because they are so dependent on  
21    what the Federal government has done, they should not be  
22    surprised that the Federal government having attached  
23    the -- they tied the strings, they shouldn't be  
24    surprised if the Federal government isn't going to start  
25    pulling them.

1                   MR. CLEMENT: With all due respect,  
2   Mr. Chief Justice, I don't think we can say that, you  
3   know, the States have gotten pretty dependent, so let's  
4   call this whole federalism thing off. And I just think  
5   it's too important. Because again, the consequence --  
6   if you think about it -- if -- the consequence of saying  
7   that we're not going to police the coercion line here  
8   shouldn't be that well, you know, it's just too hard, so  
9   we'll give the Federal Congress unlimited spending  
10  power.

11                  The consequence ought to be, if you really  
12  can't police this line, then you should go back and  
13  reconsider your cases that say that Congress can spend  
14  money on things that it can't do directly.

15                  Now, we're not asking you to go that far.  
16  We're simply saying that look, your spending power cases  
17  absolutely depend on there being a line between coercion  
18  --

19                  JUSTICE SOTOMAYOR: But could you tell me --

20                  MR. CLEMENT: -- and voluntary action.

21                  JUSTICE SOTOMAYOR: I don't understand your  
22  first answer to Justice Kagan. You don't see there  
23  being a difference between the Federal government saying  
24  we want to take care of the poor. States, if you do  
25  this, we'll pay 100 percent of your administrative

1 costs. And you said that could be coercion. All right.  
2 Doesn't the amount of burden that the State undertakes  
3 to meet the Federal obligation count in this equation at  
4 all?

5 MR. CLEMENT: It -- it certainly can,  
6 Justice Sotomayor. I didn't mean to suggest in  
7 answering Justice Kagan's question that my case was no  
8 better than that hypothetical. I mean, but if in the  
9 nature of things that I do think the amount of the money  
10 even considered alone does make a difference, and it's  
11 precisely because it has an effect on their ability to  
12 raise revenue from their own citizens. So it's not just  
13 free money that they are turning down if they want to.  
14 It really is --

15 JUSTICE SOTOMAYOR: Counsel, if we go back  
16 to the era of matching what a State pays to what a State  
17 gets, Florida loses. It's citizens pay out much less  
18 than what they get back in Federal subsidies of all  
19 kinds. So you can't really be making the argument that  
20 Florida can't ask for more than it gives, because it's  
21 really giving less than it receives.

22 MR. CLEMENT: Well then --

23 JUSTICE SOTOMAYOR: You don't really want to  
24 go to that point, do you?

25 MR. CLEMENT: Well, then I will make that

1 argument on behalf of Texas.

2 (Laughter.)

3 MR. CLEMENT: But it's not, it's not what my  
4 argument depends on. And that's the critical thing.  
5 It's one aspect of what makes this statute uniquely  
6 coercive.

7 And I really think if you ask the question:  
8 What explains the idea that if you don't take this new  
9 money you are going to lose all your money under what  
10 you have been doing for 45 years to help out the  
11 visually impaired and disabled? Nobody in Congress  
12 wants the States to stop doing that. They are just  
13 doing it, and it's purely coercive to condition the  
14 money. It's leverage, pure and simple.

15 JUSTICE KENNEDY: If the inevitable  
16 consequence of your position was that the Federal  
17 government could just do this on its own, the Federal  
18 government could have Medicaid, Medicare, and these  
19 insurance regulations. Assume that's true. Then how  
20 are the interests of federalism concerned? How are the  
21 interests of federalism concerned if in Florida or Texas  
22 or some other objecting States there are huge Federal  
23 bureaucracies doing what this bill allows the State  
24 bureaucracies to do. I know you have thought about  
25 that. I would just like your answer.

1                   MR. CLEMENT: I have, and I would like to  
2 elaborate that the one word answer is "accountability."

3                   If the Federal government decides to spend  
4 money through Federal instrumentalities and the  
5 citizenry is hacked off about it, they can bring a  
6 Federal complaint to a Federal official working in a  
7 Federal agency. And what makes this so pernicious is  
8 that the Federal government knows that the citizenry is  
9 not going to take lightly the idea that there are huge,  
10 new Federal bureaucracies popping up across the country.  
11 And so they get the benefit of administering this  
12 program through State officials, but then it makes it  
13 very confusing for the citizen who doesn't like this.  
14 Do they complain to the State official because it's  
15 being administered in the State official in a State  
16 building?

17                  JUSTICE KAGAN: Mr. Clement, that is very  
18 confusing because the idea behind cooperative  
19 Federal/State programs was exactly a federalism idea.  
20 It was to give the States the ability to administer  
21 those programs. It was to give the States a great deal  
22 of flexibility in running those programs. And that's  
23 exactly what Medicaid is.

24                  MR. CLEMENT: Well, that's exactly what  
25 Medicaid was. The question is: What will it be going

1 forward? And I absolutely take your point, Justice  
2 Kagan. Cooperative federalism is a beautiful thing.  
3 Mandatory federalism has very little to recommend it  
4 because it poses exactly the kind of accountability --

5 JUSTICE KAGAN: Cooperative federalism does  
6 not mean that there are no Federal mandates and no  
7 Federal restrictions involved in a program that uses  
8 90 percent here, 100 percent Federal money. It means  
9 there is flexibility built into the program subject to  
10 certain rules that the Federal government has about how  
11 it wishes its money to be used. It's like giving a gift  
12 certificate. If I give you a gift certificate for one  
13 store, you can't use it for other stores. But still you  
14 can use it for all kinds of different things.

15 MR. CLEMENT: I absolutely agree that if  
16 it's cooperative federalism and the States have choices,  
17 then that is perfectly okay. But when -- that's why  
18 voluntariness and coercion is so important. Because if  
19 you force a State to participate in a Federal program,  
20 then -- I mean, as long as it's voluntary then a State  
21 official shouldn't complain if a citizen complains to  
22 the State about the way the State's administering a  
23 Federal program that it volunteered to participate in.  
24 But at the point it becomes coercive, then it's not fair  
25 to tell the citizen to complain to the State official.

1 They had no choice.

2 But who do they complain at the Federal  
3 level? There's nobody there, which would be -- I'm not  
4 saying it's the best solution to have Federal  
5 instrumentalities in every State, but it actually is  
6 better than what you get when you have mandatory  
7 federalism and you lose the accountability that is  
8 central to the federalism provisions in the  
9 Constitution.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
11 Clement.

12 General Verrilli?

13 ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.,  
14 ON BEHALF OF THE RESPONDENTS

15 GENERAL VERRILLI: Mr. Chief Justice, and  
16 may it please the Court:

17 The Affordable Care Act's Medicaid expansion  
18 provisions will provide millions of Americans with the  
19 opportunity to have access to essential health care that  
20 they cannot now afford. It is an exercise of the  
21 Spending Clause power that complies with all of the  
22 limits set forth in this Court's decision in Dole, and  
23 the States do not contend otherwise. The States are  
24 asking this Court to do something unprecedented, which  
25 is, to declare this an impermissibly coercive exercise.

1 JUSTICE SCALIA: What do you think we meant  
2 in those dicta in several prior cases where we've said  
3 that the Federal government cannot be coercive through  
4 the Spending Clause? What -- what do you think we  
5 were -- give us a hypothetical.

6 GENERAL VERRILLI: Yes. First, if I could  
7 just try to be a little more precise about it,  
8 Justice Scalia. I think what the Court said in Steward  
9 Machine and in Dole is that it's possible that you might  
10 envision a situation in which there's coercion --

11 JUSTICE SCALIA: Okay.

12 GENERAL VERRILLI: And the courts didn't say  
13 much more. But I can think of something. One example I  
14 could think of that might serve as a limit would be a  
15 Coyle type situation, in which the condition attached  
16 was worth a fundamental transformation in the structure  
17 of State government in a situation in which the State  
18 didn't have a choice but to accept it. But -- and so --

19 JUSTICE SCALIA: Anything else, so long  
20 as you --

21 GENERAL VERRILLI: Well, but --

22 JUSTICE SCALIA: You are talking about  
23 situations where they have to locate their State house  
24 in some other city --

25 GENERAL VERRILLI: Or you may have a

1 legislature --

2 JUSTICE SCALIA: And they have no choice.

3 But short of that, they can make the State do anything  
4 at all?

5 GENERAL VERRILLI: No, no. Dole -- the Dole  
6 conditions are real. The germaneness condition in Dole  
7 is real, for example, and so those --

8 CHIEF JUSTICE ROBERTS: None of those have  
9 addressed the coercion question.

10 GENERAL VERRILLI: Right.

11 CHIEF JUSTICE ROBERTS: So then you think it  
12 would be all right for the Federal government to say --  
13 same program: States, you can take this or you can  
14 leave it. But if you don't take it, you lose every last  
15 dollar of Federal funding for every program.

16 GENERAL VERRILLI: I think that would raise  
17 a germaneness issue, Mr. Chief Justice, but it's not  
18 what we have here.

19 CHIEF JUSTICE ROBERTS: But there's no  
20 coercion question at all.

21 GENERAL VERRILLI: Well, but I think -- I  
22 think they are related. I think that the germaneness  
23 inquiry in Dole really gets at coercion in some  
24 circumstances, and that's why I think they are related.  
25 But we don't have that here.

1 And if I could, I would like to address --

2 CHIEF JUSTICE ROBERTS: No, I know we don't  
3 have that here. How does germaneness get -- get  
4 to coercive?

5 GENERAL VERRILLI: Because it gets to be  
6 harder to see what --

7 CHIEF JUSTICE ROBERTS: That's germane if  
8 there's no --

9 GENERAL VERRILLI: What the connection is  
10 between getting you to do A and the money you are  
11 getting for --

12 CHIEF JUSTICE ROBERTS: So it fails because  
13 it is not germane. But you are saying it would not fail  
14 because it was coercive.

15 GENERAL VERRILLI: Why -- I think that -- as  
16 I said, I think they are really trying to get at the  
17 same thing, and I -- but I do think it's quite different  
18 here, and I would like to, if I could, take up each of  
19 the --

20 CHIEF JUSTICE ROBERTS: No, I know -- I know  
21 it's different here. I'm just trying to understand if  
22 you accept the fact or regarded as true that there is a  
23 coercion limit, or that once the Federal government --  
24 once you are taking Federal government money, the  
25 Federal government money -- can take it back, and that

1 doesn't affect the voluntariness of your choice.  
2 Because it does seem like a serious problem. We are  
3 assuming under the Spending Clause the Federal  
4 government cannot do this. Under the Constitution it  
5 cannot do this. But if it gets the State to agree to  
6 it, well, then it can. And the concern is, if you can  
7 say: If you don't agree with this, you lose all your  
8 money, whether that's really saying the limitation in  
9 the Constitution is -- is largely meaningless.

10 GENERAL VERRILLI: Well, but I don't think  
11 that this is a case that presents that question.

12 CHIEF JUSTICE ROBERTS: No, no, I know. I  
13 know this. I don't know if I will grant it to you or  
14 not. But let's assume it's not this case. Do you  
15 recognize any limitation on that concern?

16 GENERAL VERRILLI: I think the Court has  
17 said in Steward Machine and Dole that this is something  
18 that needs to be considered in an appropriate case. And  
19 we acknowledge that. But I do think it's so dependent  
20 on the circumstances that it's very hard to say in the  
21 abstract with respect to a particular program that there  
22 is a --

23 JUSTICE SCALIA: You can't imagine a case in  
24 which it is both germane and yet coercive, is what you  
25 are saying. There is no such case as far as you know.

1                   GENERAL VERRILLI: Well, I am not prepared  
2 to -- to say right here that I can -- that --

3                   JUSTICE SCALIA: I wouldn't think that is a  
4 surprise question, you know?

5                   GENERAL VERRILLI: Congress has authority to  
6 act and --

7                   JUSTICE SCALIA: I can't think of one. I'm  
8 not blaming you for not thinking of one.

9                   (Laughter.)

10                  GENERAL VERRILLI: But I do think -- I  
11 really do think that it's important to look at this, an  
12 issue like this. If you are going to consider it, it  
13 has got to be considered in a factual context from which  
14 it arises.

15                  JUSTICE ALITO: Let me give you a factual  
16 context. Let's say Congress says this to the States:  
17 We have got great news for you; we know your  
18 expenditures on education are a huge financial burden,  
19 so we are going to take that completely off your  
20 shoulders; we are going to impose a special Federal  
21 education tax which will raise exactly the same amount  
22 of money as all of the States now spend on education;  
23 and then we are going to give you a grant that is equal  
24 to what you spent on education last year.

25                  Now, this is a great offer and we think you

1 will take it, but of course, if you take it, it's going  
2 to have some conditions because we are going to set  
3 rules on teacher tenure, on collective bargaining, on  
4 curriculum, on textbooks, class size, school calendar  
5 and many other things. So take it or leave it.

6           If you take it, you have to follow our rules  
7 on all of these things. If you leave it, well, then you  
8 are going to have to fine -- you are going to have to  
9 tax your citizens, they are going to have to pay the  
10 Federal education tax; but on top of that, you were  
11 going to have to tax them for all of the money that you  
12 are now spending on education. Plus all of the Federal  
13 funds that you were previously given.

14           Would that be -- would that reach the  
15 point -- would that be the point where financial  
16 inducement turns into coercion?

17           GENERAL VERRILLI: No, I don't think so --

18           JUSTICE ALITO: No.

19           GENERAL VERRILLI: -- because they do, the  
20 States do have a choice there, especially as a -- as a  
21 going-in proposition. The argument the States are  
22 making here is not that they're -- that -- this is not a  
23 going-in proposition. Their argument is that they're --  
24 they are in a position where they don't have a choice  
25 because of everything that has happened before. But --

1 JUSTICE ALITO: You might be right. But if  
2 that is the case then there is nothing left --

3 GENERAL VERRILLI: Well, but as a --

4 JUSTICE ALITO: -- of federalism.

5 GENERAL VERRILLI: As a practical matter, I  
6 disagree with that, Justice Alito. First of all, as a  
7 practical matter there is a pretty serious political  
8 constraint on that situation ever arising, because it's  
9 not like the Federal Government is going to have an easy  
10 time of raising the kinds of tax revenues that need to  
11 be -- needed to raised to work that kind of fundamental  
12 transformation, and that is real. And political  
13 constraints do operate to protect federalism in this  
14 area.

15 JUSTICE SCALIA: I would have thought there  
16 was a serious political strain -- constraint on the  
17 individual mandate, too, but that didn't work. What you  
18 call serious political constraints sometimes don't work.

19 GENERAL VERRILLI: But -- but with respect  
20 to a situation like that one, Justice Scalia, the -- the  
21 States have their education system, and they can decide  
22 whether they are going to go in or not. But here, of  
23 course, I think it's important to trace through the  
24 history of Medicaid. It, it is not a case, as my friend  
25 from the other side suggested, that the norm here is

1     that the Federal Government has offered to the States  
2     the opportunity either to stay where they are or add the  
3     new piece. We can debate that proposition with respect  
4     to 1972 one way or another, the States have one view  
5     about that; we have a different one. But starting in  
6     the 1984 expansion, with respect to pregnant women and  
7     infants, it was an expansion of the entire program;  
8     States were given the choice to stay in the entire  
9     program or not. 1989 when the program was expanded to  
10    children under 6 years of age, under 133 percent of  
11    poverty, same thing. 1990, kids 6 to 18 and 100 percent  
12    of poverty, same thing. In fact, every major expansion,  
13    same thing.

14                   And so I just think the history of the  
15    program, and particularly when you read that in context  
16    of 42 U.S.C. 1304, which reserves the right of the  
17    Federal Government to amend the program going forward,  
18    shows you that this is something that the States have  
19    understood all along. This has been the evolution of  
20    it, and with respect to --

21                   CHIEF JUSTICE ROBERTS: Could you give me  
22    some assurance? We heard the question about whether or  
23    not the Secretary would use this authority to the extent  
24    available. Is there circumstances where you are willing  
25    to say that that would not be permissible? I'm thinking

1 of the Arizona letter, for example. I mean, if I had  
2 the authority and I was in that position, I would use it  
3 all the time. You might -- you want some little change  
4 made? Well, guess what; I can take away all your money  
5 if you don't make it. I win. Every time. It seems  
6 that that would be the case.

7 So why shouldn't we be concerned about the  
8 extent of authority that the government is exercising,  
9 simply because they could do something less? We have to  
10 analyze the case on the assumption that that power will  
11 be exercised, don't we?

12 GENERAL VERRILLI: Well, Mr. Chief Justice,  
13 it would not be responsible of me to stand here in  
14 advance of any particular situation becoming -- coming  
15 before the Secretary of Health and Human Services and  
16 commit to how that would be resolved one way or another.  
17 But that --

18 CHIEF JUSTICE ROBERTS: No, I appreciate  
19 that. I appreciate that, but I guess --

20 GENERAL VERRILLI: That discretion is there  
21 in the statute, and I have every reason to think it is  
22 real, but I do think, getting back to the circumstances  
23 here --

24 JUSTICE KAGAN: Well, General, what's the --  
25 been the history of its use? Has the Secretary in fact

1 ever made use of that authority?

2 GENERAL VERRILLI: That's correct, Justice  
3 Kagan. It's never been used --

4 CHIEF JUSTICE ROBERTS: What about the  
5 Arizona letter we just heard about today?

6 GENERAL VERRILLI: It has never been used to  
7 cut off --

8 CHIEF JUSTICE ROBERTS: It's been used to  
9 threaten --

10 JUSTICE SCALIA: Of course not.

11 CHIEF JUSTICE ROBERTS: Of course no States  
12 would say okay, go ahead but -- make my day, take it  
13 away; they are -- they are going to give in.

14 GENERAL VERRILLI: If we could go to the  
15 situation we have here, Mr. Chief Justice, this -- with  
16 respect to the Medicaid expansion, the States' argument  
17 is, as they said in their briefs, they articulated a  
18 little bit different this morning -- this afternoon.  
19 But as they said it in their briefs, was, it's not what  
20 you stand to gain, but what you stand to lose. But I  
21 think an important thing in evaluating that argument in  
22 this context is fully 64 percent of Medicaid  
23 expenditures in this country are based on optional  
24 choices; and I don't mean by that the optional choices  
25 of the States to stay in the program in '84 or '88 or

1 '89. But -- but States are given the choices to expand  
2 the beneficiaries beyond the Federal minimum and to  
3 expand services beyond the Federal minimum.

4 JUSTICE KENNEDY: And just a small point,  
5 and please correct me if I am wrong. It -- does this  
6 Act not require States to keep at the present level  
7 their existing Medicaid expenditure? So some States may  
8 have been more generous than others in Medicaid, but  
9 this Act freezes that so the States can't go back. Or  
10 am I incorrect?

11 GENERAL VERRILLI: It's much more nuanced  
12 than that, Justice Kennedy. There is something called a  
13 maintenance of effort provision which lasts until 2014,  
14 until such time as the Medicaid expansion takes place  
15 and the exchanges are in place. That applies to the  
16 population. It says with respect to the population, you  
17 can't take anybody out. It does not apply to the  
18 optional benefits where the States still have  
19 flexibility, they can still reduce optional benefits  
20 that they are now providing if they -- if they want  
21 to -- to control costs. They can also work on provider  
22 rates, there's also with respect to demonstration  
23 projects by which some States have expanded their  
24 populations beyond the required eligibility levels, they  
25 don't have to keep them in. So -- and then there's

1 also, if the State has a budgetary crisis, it can get a  
2 waiver of that, as Wisconsin did. So that is a --  
3 that's a provision I think that does a significant  
4 degree less than my friends on the other side have  
5 suggested in terms of -- in terms of its effect, and its  
6 effect beyond that is just temporary.

7 I do think with respect to the -- the first  
8 of their three arguments for coercion, the sheer size  
9 argument, that it's very difficult to see how that is  
10 going to work; because if the question is about what you  
11 stand to lose rather than what you stand to gain, then  
12 it seems to me that it doesn't matter whether the  
13 Medicaid expansion is substantial or whether it's  
14 modest, or whether there is any expansion at all. The  
15 States, for example -- the Federal Government, for  
16 example, could decide that under -- under the current  
17 system too much money has ended up flowing to nursing  
18 care and that money would be better serving the general  
19 welfare if it were directed at infants and children.  
20 But if the Federal Government said we are going to  
21 redirect the spending priorities of the Federal money  
22 that we are offering to you, the States could say well,  
23 Geez, we don't like that; we would like to keep spending  
24 the money the way we were, and we have no choice,  
25 because this has gotten too big for us to exit. And so

1 -- and in fact, it seems to me, standing here today  
2 before these expansions take place, under their theory,  
3 the provision is --

4 JUSTICE SCALIA: The smaller it, is the  
5 bigger the coercion.

6 GENERAL VERRILLI: -- well --

7 JUSTICE SCALIA: The smaller what you are  
8 demanding of them, the bigger the coercion to go along.

9 GENERAL VERRILLI: The more they stand to  
10 lose. And -- and so -- and then it -- I'm sorry,  
11 Justice Breyer.

12 JUSTICE BREYER: I -- just before you leave  
13 that, I'd -- I'd appreciate it if you would expand a  
14 little bit on the answer to Justice Kagan's question.  
15 For the reason, when I read the cutoff statute, which as  
16 I said has been there since 1965 unchanged, it does  
17 refer to the Secretary's discretion to keep the funding,  
18 insofar as the funding has no relationship to the  
19 failure to comply with the condition.

20 And as I read that, that gives the Secretary  
21 the authority to cut off all the money, but the State's  
22 refusal to accept the condition means they shouldn't  
23 have. But nothing there says they can go beyond that  
24 and cut off unrelated money. Now there is a sentence  
25 says maybe they could do that. I thought they had to

1 exercise that within reason.

2 GENERAL VERRILLI: Well --

3 JUSTICE BREYER: I don't know when it be  
4 reasonable. So you have looked into it, and that's what  
5 I want to know.

6 GENERAL VERRILLI: Right.

7 JUSTICE BREYER: Is there -- I could find no  
8 instance where they went beyond the funds that were  
9 related to the thing that the State refused to do, or  
10 things affected by that. I would like you to tell me,  
11 when you looked into it, that what I thought of in this  
12 isolation chamber here is actually true. Or whether  
13 they have run around threatening people that we will cut  
14 off totally unrelated funds.

15 What is the situation?

16 GENERAL VERRILLI: I think the situation is  
17 generally as you have described it, but I do want to be  
18 careful in saying I -- I don't think it would be  
19 responsible of me to commit now that the Secretary would  
20 exercise the discretion uniformly in one way or another.

21 CHIEF JUSTICE ROBERTS: Well, but that's  
22 just saying that when, you know, the analogy that has  
23 been used, the gun to your head, "your money or your  
24 life," you say well, there is no evidence that anyone  
25 has ever been shot.

1                   GENERAL VERRILLI:   But --

2                   CHIEF JUSTICE ROBERTS:   Well, it's because  
3   you have to give up your wallet.   You don't have a  
4   choice.

5                   GENERAL VERRILLI:   But that --

6                   CHIEF JUSTICE ROBERTS:   And you cannot  
7   represent -- you cannot represent that the Secretary has  
8   never said, "and if you don't do it, we are going to  
9   take away all the funds. " They cite the Arizona  
10   example; I suspect there are others, because that is the  
11   leverage.

12                  GENERAL VERRILLI:   But it --

13                  CHIEF JUSTICE ROBERTS:   I'm not saying there  
14   is anything wrong with it.

15                  GENERAL VERRILLI:   It's not coercion, Mr.  
16   Chief Justice.

17                  CHIEF JUSTICE ROBERTS:   Wait a second.   It's  
18   not -- it's not coercion -- well, I guess that's what  
19   the case is.   It's not coercion --

20                  GENERAL VERRILLI:   It's not coercion.

21                  CHIEF JUSTICE ROBERTS:   -- to say I'm going  
22   to take away all your funds, no matter how minor the  
23   infringement?

24                  GENERAL VERRILLI:   But -- But of course --

25                  JUSTICE BREYER:   But I don't know if that's

1 so. And all I asked in my question was I didn't ask you  
2 to commit the Secretary to anything. I wanted to know  
3 what the facts are.

4 GENERAL VERRILLI: I --

5 JUSTICE BREYER: I wanted to know what you  
6 found in researching this case. I wanted you to, in  
7 other words, to answer the question the Chief Justice  
8 has: Is it a common thing, that that happens, that this  
9 unrelated threat is made? Or isn't it?

10 GENERAL VERRILLI: It's -- my understanding  
11 is that these situations are usually worked out back and  
12 forth between the States and the Federal government.  
13 And I think that most --

14 JUSTICE BREYER: And you are not privy to  
15 what those are.

16 GENERAL VERRILLI: And I'm not. But --

17 JUSTICE SCALIA: And who wins.

18 GENERAL VERRILLI: Well, I think -- that's  
19 what I think is the problem here, Justice Scalia, is it  
20 seems to me we are operating under a conception that  
21 isn't right. The reason we have had all these Medicaid  
22 expansions and the reason seems to me why we are were  
23 where we are now and why 60 percent of what's being  
24 spent on Medicaid is based on voluntary decisions by the  
25 States to expand beyond what Federal law requires,

1     because this is a good program and it works. And the  
2     States generally like what it accomplishes --

3                 JUSTICE KAGAN: And, General Verrilli --

4                 JUSTICE ALITO: Is this discussion  
5     realistic? The objective of the Affordable Care Act is  
6     to provide near universal health care. Now suppose that  
7     all of the 26 States that are parties to this case were  
8     to say, well, we're not going to -- we're not going to  
9     abide by the new conditions. Then there would be a huge  
10    portion -- a big portion of the population that would  
11    not have healthcare, and it's a realistic possibility  
12    the Secretary is going to say, well, okay, fine, you  
13    know. We are going to cut off your new funds but we are  
14    not going to cut off your old funds and just let that  
15    condition sit there.

16                GENERAL VERRILLI: Well, just as I can't  
17    make a commitment that the authority wouldn't be  
18    exercised, I'm not going to make a commitment that it  
19    would be exercised. But I do think that that -- to try  
20    and move away from the first of their argument, the  
21    sheer size argument, to the second one, which is that  
22    it's coercive by virtue of its relationship to the  
23    Affordable Care Act. I really think that that's a  
24    misconception and I would like to be able to take a  
25    minute and walk through and explain why that is.

1 JUSTICE KAGAN: General Verrilli, before you  
2 do that, I'm sorry, but in response to the Chief  
3 Justice's question -- I mean the money or your life has  
4 consequence because we are worried that that person is  
5 actually going to shoot. So I think that this question  
6 about are we -- what do we think the Secretary is going  
7 to do is an important one.

8 And as I understand it, I mean when the  
9 Secretary withdraws funds, what the Secretary is doing  
10 is withdrawing funds from poor people's health care.  
11 And that the Secretary is reluctant and loathe to take  
12 money away from poor people's health care. And that  
13 that's why these things are always worked out. It's  
14 that the Secretary really doesn't want to use this  
15 power. And so the Secretary sits down with the State  
16 and figures out a way for the Secretary not to use the  
17 power.

18 GENERAL VERRILLI: That's correct, Justice  
19 Kagan. That is no --

20 CHIEF JUSTICE ROBERTS: No, what the --

21 GENERAL VERRILLI: I'm sorry --

22 CHIEF JUSTICE ROBERTS: Go ahead.

23 GENERAL VERRILLI: That's another way of  
24 trying to say what I was trying to say to Justice Scalia  
25 earlier is that the States and the Federal government

1 share a common objective here, which is to get health  
2 care to the needy. And in the vast majority of  
3 instances they work together to make that happen.

4 CHIEF JUSTICE ROBERTS: Well, but the  
5 question is not obviously the States are interested in  
6 the same objective and they have a disagreement or they  
7 have budget realities that they have to deal with. And  
8 States say, well, we are going to cut by 10 percent what  
9 we reimburse this for or that for and the Federal  
10 government says well, you can't.

11 And no one is suggesting that people want to  
12 cut health care but they have different views about how  
13 to implement policy in this area. And the concern is  
14 that the Secretary has the total and complete say  
15 because the Secretary has the authority under this  
16 provision to say you lose everything. No one's  
17 suggested in the normal course that will happen, but so  
18 long as the Federal government has that power, it seems  
19 to be a significant intrusion on the sovereign interests  
20 of the State.

21 Now I'm not -- it may be something they gave  
22 up many decades ago when they decided to live off of  
23 Federal funds. But I don't think you can deny that it's  
24 a significant authority that we are giving the Federal  
25 government to say that you can take away everything if

1 the States don't buy into the next program.

2 GENERAL VERRILLI: Well, but what I would  
3 say about that Mr. Chief Justice, is that we recognize  
4 that these decisions aren't going to be easy decisions  
5 in some circumstances. As a practical matter there may  
6 be circumstances in which they are very difficult  
7 decisions. But that's different from saying that they  
8 are coercive and that's different from saying that it's  
9 an unconstitutional --

10 JUSTICE BREYER: Why is it different? Why  
11 is it different? I mean, I thought it might be very  
12 unlikely that the State would ever say that the  
13 government -- the Federal government would say here's a  
14 condition that you have to have a certain kind of  
15 eyeglasses for people who don't see. And by the way if  
16 you don't do that we'll take away \$42 billion of  
17 funding, okay?

18 I thought such a thing would not happen.  
19 And I thought that if it tried to happen that it's  
20 governed by the APA and the person with eyeglasses would  
21 say it's arbitrary, capricious, abusive discretion. And  
22 that's so, even though the statute says it's in the  
23 discretion of the Secretary but Mr. -- your colleague  
24 and brother says no, I'm wrong about the law there and  
25 moreover they would do it. That's what I'm hearing now,

1     that they would do it and they do do it, and -- and,  
2     etc. So I would like a little clarification.

3                 GENERAL VERRILLI: In of the situation  
4     described in your hypothetical, Justice Breyer, the  
5     Secretary of health and human services would never do  
6     it. But with respect.

7                 JUSTICE SCALIA: Could never do it or would  
8     a prediction, okay.

9                 GENERAL VERRILLI: Well, I think it would  
10    have to satisfy the administrative procedure, that's a  
11    real constraint. When I don't what I don't feel able to  
12    do here is to say with respect to this Medicaid  
13    expansion.

14                JUSTICE SCALIA: Are you willing to  
15    acknowledge that the Administrative Procedure Act is a  
16    limitation on the secretary's ability to cut off all the  
17    funds; she can't do it if it -- if that would be  
18    unreasonable? Are you willing to accept that? I  
19    wouldn't if I were you.

20                GENERAL VERRILLI: So what I'm trying to do  
21    here is to -- is to suggest that the secretary does have  
22    discretion under the statute, and that that -- and that  
23    --

24                JUSTICE SCALIA: Indeed, part of the  
25    discretion is to cut off all of the funds. That's what

1 the statute says.

2 GENERAL VERRILLI: -- and it is possible,  
3 and I'm not willing to give that away. But that doesn't  
4 make this --

5 JUSTICE KAGAN: But, General Verrilli, you  
6 are not willing to give away whether the APA would bar  
7 that; but, the APA surely has to apply to a  
8 discretionary act of the secretary.

9 GENERAL VERRILLI: I agree with that,  
10 Justice Kagan, but --

11 JUSTICE BREYER: What's making you  
12 reluctant?

13 GENERAL VERRILLI: I'm not trying to be --  
14 I'm not trying to be reluctant. I understand how this  
15 works. I'm trying to be careful about the authority of  
16 the Secretary of Health and Human Services and how it  
17 will apply in the future.

18 JUSTICE SCALIA: I wouldn't worry a lot if I  
19 were you. I don't know of any case that, where the  
20 secretary's discretion explicitly includes a certain  
21 act, we have held that, nevertheless, that act cannot be  
22 performed unless we think it reasonable. I don't know  
23 any case like that.

24 Yes, when there is just a general grant of  
25 discretion, it has to be exercised reasonably. But

1 maybe Justice Breyer knows such a case.

2 JUSTICE BREYER: Yes, I do.

3 JUSTICE SCALIA: Give it to me.

4 GENERAL VERRILLI: If I could go back to the  
5 sheer size idea, there is, I think, another couple of  
6 points that are important in thinking about whether  
7 that's a principle courts could ever apply.

8 Once you get into that business, in addition  
9 to the problem I identified earlier, that it basically  
10 means that Congress is frozen in place, based on the  
11 size of the program, you have got this additional issue  
12 of having to make a judgment about in what circumstances  
13 will -- will the loss of the federal funding be so  
14 significant that you would count it as -- coercive.

15 JUSTICE KENNEDY: I suppose one test could  
16 be -- I just don't see that it would be very workable --  
17 is whether or not it's so big that accountability is  
18 lost, that it is not clear to the citizens that the  
19 State or the Federal Government is administering the  
20 program, even though it's a state administrator.

21 GENERAL VERRILLI: Well, but I think --

22 JUSTICE KENNEDY: I think that's unworkable.

23 GENERAL VERRILLI: -- this is going to come  
24 from a withdrawal situation. Their argument's about  
25 it's what you stand to lose and with respect to

1 withdrawal.

2 I mean, so, does it depend on -- is it an  
3 absolute or a relative number with respect to how much  
4 of the state budget? Is it a situation where you have  
5 to make a calculation about how hard would it be for  
6 that state to make up in state tax revenues the federal  
7 revenue they would lose? Does that depend on whether  
8 it's a high tax state or a low tax state. It just seems  
9 to me -- and then, what is the political climate in that  
10 state? It seems to me like --

11 JUSTICE KENNEDY: In your view, does  
12 federalism require that there be a relatively clear line  
13 of accountability for political acts?

14 GENERAL VERRILLI: Yes, of course, it does,  
15 Justice Kennedy. But, here --

16 JUSTICE KENNEDY: Is that subsumed in the  
17 coercion test, or is that an independent?

18 GENERAL VERRILLI: You know, here, the  
19 coercion test, as it's been discussed, I think, for  
20 example, in Justice O'Connor's dissent in Dole and in  
21 some of the other literature, does address federalism  
22 concerns in the sense of the Federal Government using  
23 federal funding in one area to try to get states to act  
24 in an area where the Federal Government may not have  
25 Article I authority.

1 JUSTICE KENNEDY: Yes.

2 GENERAL VERRILLI: But, as Your Honor  
3 suggested earlier, this is a situation in which, while  
4 it is certainly true that the Federal Government  
5 couldn't require the states, as the Chief Justice  
6 indicated, to carry out this program, the federal  
7 government could, as Your Honor suggested, expand  
8 Medicare and do it itself.

9 JUSTICE KENNEDY: But do you think that  
10 there still is inherent and implicit in the idea of  
11 federalism, necessary for the idea of federalism, that  
12 there be a clear line of accountability so the citizen  
13 knows that it's the Federal or the State government who  
14 should be held responsible for a program?

15 GENERAL VERRILLI: Certainly, but I  
16 think the problem here is --

17 JUSTICE KENNEDY: And does coercion relate  
18 to that, or is that a separate --

19 GENERAL VERRILLI: Yes, but I think --

20 JUSTICE KENNEDY: -- is that a separate  
21 doctrine?

22 GENERAL VERRILLI: Well, I think it relates  
23 to it in the opposite way that my friends on the other  
24 side would like it to, in that I think their argument is  
25 that it would subject us to such a high degree of

1 political accountability at the state level to withdraw  
2 ourselves from the program, that it's an unpalatable  
3 choice for us, and that's where the coercive effect  
4 comes from. And that's why I think --

5 JUSTICE KENNEDY: Well, but I think the  
6 answer would be that the state wants to preserve its  
7 integrity, its identity, its responsibility in the  
8 federal system.

9 GENERAL VERRILLI: And it may -- and, of  
10 course, it may do so, and it can make --

11 JUSTICE SCALIA: May it do so?

12 Doesn't the question come down to this --  
13 maybe you can answer this yes. But -- but isn't the  
14 question simply: Is it conceivable to you, as it was  
15 evidently not to Congress, that any State would turn  
16 down this offer, that they can't refuse? Is it  
17 conceivable to you that any State would have said no to  
18 this program? Congress didn't think that, because some  
19 of its other provisions are based on the assumption that  
20 every single State will be in this thing.

21 Now, do you -- can you conceive of a State  
22 saying no? And -- and if you can't, that sounds like  
23 coercion to me.

24 GENERAL VERRILLI: I think -- I think  
25 Congress predicted that States would stay in this

1 program, but the -- prediction is not coercion. And the  
2 reason Congress predicted it, I think, Justice Scalia,  
3 is because the Federal government is paying 90-plus  
4 percent of the costs. It increases State costs --

5 JUSTICE SCALIA: So what do you predict? If  
6 you predict the same, that 100 percent of the States  
7 will accept it, that sounds like coercion.

8 GENERAL VERRILLI: Prediction is not  
9 coercion. I disagree, Justice Scalia. That's just an  
10 assumption, and if it proves to be wrong, then Congress  
11 has time to recalibrate. And beyond that, I do think if  
12 -- I just want to go back to the other part of Your  
13 Honor's point -- that with respect to the relationship  
14 between Medicaid and the Act, and particularly the  
15 minimum coverage provision, my -- my friend Mr. Clement  
16 has suggested that you can infer coercion because with  
17 respect to the population to which the provision  
18 applies, if there's no Medicaid, there's no other way  
19 for them to satisfy the requirement.

20 I want to work through that for a minute if  
21 I may, because it's just incorrect.

22 First of all, with respect to anybody at  
23 100 percent of the poverty line or above, there is an  
24 alternative in the statute. It's the exchanges with tax  
25 credits and with subsidies to insurance companies. So

1 with respect to that, the part of the population at  
2 100 percent of poverty to 133 percent of poverty, the --  
3 the statute actually has an alternative for them.

4 For people below 100 percent of poverty, it  
5 -- it is true that there is no insurance alternative.  
6 But by the same token, there is no penalty that is going  
7 to be imposed on anybody in that group.

8 To begin with, right now, the -- the level  
9 of 100 percent of poverty is \$10,800. The -- the  
10 requirement for filing a Federal income tax return is  
11 \$9,500. So anybody below \$9,500, no penalty, because  
12 they don't have to file an income tax return. The  
13 sliver of people between \$9,500 and \$10,800, the  
14 question there is are they going to be able to find  
15 health insurance that will cost them less than 8 percent  
16 of their income.

17 JUSTICE ALITO: Well, I'm not -- in selling  
18 this argument -- take the poorest of the poor. If there  
19 is no Medicaid program, then they're not going to get  
20 health care. Isn't that right?

21 GENERAL VERRILLI: Yes, that's true. But  
22 this --

23 JUSTICE ALITO: So Congress obviously  
24 assumed -- it thought it was inconceivable that any  
25 State would reject this offer, because the objective of

1 the Affordable Care Act is to provide near-universal  
2 care. And Medicaid is the way to provide care for at  
3 least the poorest of the poor. So it -- it just didn't  
4 occur to them that this was a possibility. And when --  
5 when that's the case, how can that not be coercion?  
6 Unless it's just a gift. Unless it's just purely a  
7 gift.

8 Then it comes back to the question of  
9 whether you think it makes a difference that the  
10 money -- a lot of the money to pay for this -- is going  
11 to come out of the same taxpayers that the States have  
12 to tax to get their money.

13 GENERAL VERRILLI: This is -- this is a --  
14 this is -- these are Federal dollars that Congress has  
15 offered to the States and said, we're going to make this  
16 offer to you, but here's how these dollars need to be  
17 spent. This is the essence of Congress's Article I  
18 authority under the General Welfare Clause and the  
19 Appropriations Clause. This is not some remote  
20 contingency, or an effort to leverage in that regard.  
21 This is how Congress is going to have the Federal  
22 government's money be used if States choose to accept  
23 it.

24 Yes, it was reasonable for Congress to  
25 predict in this circumstance that the States were going

1 to -- to take this money, because -- because it is an  
2 extremely generous offer of funds: 90-plus percent of  
3 the funding. States can -- can expand their Medicaid  
4 coverage to more than 20 percent of their population for  
5 an increase of only 1 percent --

6 CHIEF JUSTICE ROBERTS: If it's such a good  
7 deal --

8 GENERAL VERRILLI: -- of their funding.

9 CHIEF JUSTICE ROBERTS: -- why do you care?  
10 If it's such a good deal, why do you need the club?

11 GENERAL VERRILLI: Well, the -- the --

12 CHIEF JUSTICE ROBERTS: It's a good deal,  
13 take it. We're not going to -- if you don't take it,  
14 you're just hurting yourself. We're not going to --

15 GENERAL VERRILLI: That's a judgment for  
16 Congress to make about how the Federal -- how Federal  
17 funds are going to be used if States choose to accept  
18 them, and Congress has made that judgment. That's  
19 Congress's judgment to make, and it's -- it doesn't mean  
20 that it's coercive.

21 CHIEF JUSTICE ROBERTS: You have another  
22 15 minutes.

23 GENERAL VERRILLI: Lucky me.

24 (Laughter.)

25 JUSTICE KENNEDY: But the -- but the point

1 is -- but the -- the point is, there's -- there's no  
2 real --

3 JUSTICE SOTOMAYOR: Can we go back --

4 JUSTICE KENNEDY: There's no real -- there's  
5 no realistic choice. There's no real choice. And  
6 Congress does not in effect allow for an out -- opt out.  
7 We just know that.

8 And it's --

9 GENERAL VERRILLI: No, I guess I --

10 JUSTICE KENNEDY: -- it's substantial.

11 GENERAL VERRILLI: I would go back, Justice  
12 Kennedy --

13 JUSTICE KENNEDY: I recognize the problem  
14 with that test.

15 GENERAL VERRILLI: I would go back to the  
16 fact that 60 percent of the Medicaid spending is now  
17 optional. It's -- it's a result of choices that States  
18 have made that -- it's expanded the --

19 JUSTICE KENNEDY: Even though they're now  
20 frozen in, per our earlier discussions, to a large  
21 extent.

22 GENERAL VERRILLI: Well, no -- to a more --  
23 much more modest extent was my point, Justice Kennedy.  
24 For example, optional services where a huge amount of  
25 money is spent -- more than \$100 billion annually -- the

1 largest component of that is nursing home services.  
2 That remains optional. It's -- right now, once the  
3 minimum -- once the maintenance provision remains in  
4 place, States have the flexibility to that -- reduce  
5 those numbers.

6 States have considerable flexibility now and  
7 going forward with respect to the way that money is  
8 spent. And I do think in terms of evaluating whether  
9 this expansion should be considered coercive has got to  
10 be evaluated against the backdrop of the fact that the  
11 States are generally taking -- are generally taking  
12 advantage of the opportunities of this statute to  
13 greatly expand the amount of money that the Federal  
14 government spends and the amount of money that they  
15 spend to try to make the -- the lives of their citizens  
16 better. I think --

17 JUSTICE KENNEDY: Of course, they have to do  
18 so by hiring a very substantial number of more  
19 employees. There will be State employees. There'll be  
20 substantial State administrative expenses that are not  
21 reimbursed.

22 GENERAL VERRILLI: Well, but -- I would take  
23 issue with that, Justice Kennedy. Part of the  
24 Affordable Care Act is that it -- it provides for new  
25 streamlined eligibility processes to get people into the

1 system at a -- at a much faster and cheaper rate. There  
2 are going to be costs to set that up. But under the  
3 statute, the Federal government is going to pay  
4 90 percent of those costs, the short-term set-up costs.  
5 And then all of the projections that we have seen  
6 suggest that the medium- to long-term costs once these  
7 changes are in place are going to be dramatically lower  
8 --

9 CHIEF JUSTICE ROBERTS: Well, what --

10 GENERAL VERRILLI: -- on the administrative  
11 side.

12 CHIEF JUSTICE ROBERTS: Obviously, the  
13 Federal government isn't bound to that. And what if,  
14 after the 90 percent, they say well, now -- from now on,  
15 we're going to pay 70 percent? What happens then?  
16 Where does that extra money come from?

17 GENERAL VERRILLI: Well, I think -- then the  
18 States would have a choice at that -- at that point  
19 whether they were going to stay in the program or not.  
20 But that isn't what we have here, and --

21 CHIEF JUSTICE ROBERTS: There's no -- they  
22 can just bail out -- whenever the government reduces the  
23 amount of the percentage that it's going to pay, the  
24 States can say, that's -- that's --

25 GENERAL VERRILLI: Well, I'm not saying it

1 would be an easy choice, Mr. Chief Justice.

2 JUSTICE SCALIA: They'd have to bail out of  
3 Medicaid, you're talking about. Not just there.

4 GENERAL VERRILLI: Right. That would be --

5 JUSTICE SCALIA: The option.

6 GENERAL VERRILLI: Right. That that would  
7 be the option. They can leave Medicaid if they decide  
8 that that isn't working for them. I'm not saying this  
9 is an easy choice. I'm also not saying it would happen,  
10 because the Secretary does have this discretion --

11 CHIEF JUSTICE ROBERTS: Well, the Secretary  
12 has the discretion. We're talking about something else.  
13 We're talking about fiscal realities, and whether or not  
14 the Federal government is going to say we need to lower  
15 our contribution to Medicaid and leave it up to the  
16 States because we want the people to be mad at the  
17 States when they have to have all these budget cuts to  
18 keep it up, and not at the Federal government.

19 GENERAL VERRILLI: That would be true, Mr.  
20 Chief Justice, whether this Medicaid expansion occurred  
21 or not.

22 CHIEF JUSTICE ROBERTS: I know, but you've  
23 been emphasizing that the Federal government is going to  
24 pay 90 percent of this, 90 percent of this, and it's --  
25 it's not something they can take to the bank, because

1 the next day or the next fiscal year, they can decide  
2 we're going to pay a lot less. And you, States, are  
3 still on the hook, because you -- you don't -- you say  
4 it's not an easy choice. We can say -- ask whether it's  
5 coercion. You're not going to be able to bail out of  
6 Medicaid. You just have to pay more because we're going  
7 to pay less.

8 GENERAL VERRILLI: Well, like I said, I -- I  
9 agree that it would be a difficult choice in some  
10 circumstances. But that is not to say it's coercion as  
11 a legal matter or even as a practical matter. And I  
12 think it would depend on what the circumstances were on  
13 how -- and I think trying to think about how a court  
14 would ever answer the question of whether it was  
15 coercive, it was too difficult as a practical matter for  
16 States --

17 JUSTICE SOTOMAYOR: General, I'm trying  
18 to --

19 GENERAL VERRILLI: -- to withdraw.

20 JUSTICE SOTOMAYOR: -- go back to that.  
21 Because Justice Kennedy asked you whether there is -- I  
22 think he said it's -- it's coercion if no one can be  
23 politically accountable. I'm not sure how that could be  
24 practically politically accountable, because almost  
25 every gift -- if the terms are attractive, it would be

1 an unattractive political alternative to turn it down.

2 Dole itself was one of those cases. I think  
3 every State raised the drinking age to 21; correct?

4 GENERAL VERRILLI: Yes, Justice Sotomayor,  
5 and this argument was raised in Dole, and the Court  
6 rejected it as a --

7 JUSTICE SOTOMAYOR: I guess my point is that  
8 political accountability has two components: What can I  
9 do if I like something, and what can I do if I don't  
10 like something. And if people really like something  
11 like Medicaid, they were not going to let you drop it,  
12 correct.

13 GENERAL VERRILLI: Well, the citizens of the  
14 State, but that's the citizen of the State acting --

15 JUSTICE SOTOMAYOR: Exactly. That's the  
16 whole point that's their choice, right?

17 GENERAL VERRILLI: -- in the capacity of the  
18 citizens of the State. And I think that's why I get --  
19 try to get back to the point, that's why I think this is  
20 wrong to think about this as coercion, because this is a  
21 program that works effectively for the citizens of the  
22 State, and States' governments -- and States governments  
23 think that and that's why it has expanded the way it has  
24 expanded, because it's providing an essential service  
25 for millions of needy citizens in these States. It's

1 providing access to health care that they would not  
2 otherwise have.

3 CHIEF JUSTICE ROBERTS: You mentioned the --  
4 the Dole case. Now, what was the -- the threat in that  
5 case, raise your drinking age to 21 -- 21 or what?

6 GENERAL VERRILLI: Or lose a percentage of  
7 your highway funds.

8 CHIEF JUSTICE ROBERTS: Do you remember the  
9 percentage?

10 GENERAL VERRILLI: Seven percent, yes.

11 CHIEF JUSTICE ROBERTS: Yes. It's a pretty  
12 small amount. That is really apples and oranges when  
13 you are talking about lose all of your Medicaid funds or  
14 lose -- I thought it was 5, but 7 -- 7 percent of your  
15 highway funds.

16 GENERAL VERRILLI: It's -- I think I agree  
17 with Your Honor, that it's -- that it's different, but I  
18 don't think that that makes coercion as -- as a legal  
19 matter. As I said, I think that this is a situation in  
20 which the -- if the States -- is it -- I'm saying it  
21 won't be an easy choice, but the States made the choice,  
22 they have made the choice. And --

23 JUSTICE SOTOMAYOR: They made a choice with  
24 the stimulus bill, didn't they? Some governors rejected  
25 the stimulus bill --

1                   GENERAL VERRILLI: That is -- that's  
2 correct, Justice Sotomayor.

3                   JUSTICE SOTOMAYOR: -- and some of -- some  
4 of their congressional or legislative processes  
5 overturned that --

6                   GENERAL VERRILLI: That's right.

7                   JUSTICE SOTOMAYOR: -- and others supported  
8 it. The percentages were smaller, but it's always the  
9 preference of the voters as to what they want, isn't it?

10                  GENERAL VERRILLI: That is correct.

11                  CHIEF JUSTICE ROBERTS: What was the threat  
12 in the stimulus bill, what would the State lose?

13                  GENERAL VERRILLI: That answer I don't know,  
14 Mr. Chief Justice.

15                  CHIEF JUSTICE ROBERTS: Would anything be  
16 taken away or would it just lose the opportunity to get  
17 the money?

18                  GENERAL VERRILLI: I don't know the answer  
19 to that. I don't know the answer to that.

20                  But if I may just say in conclusion that --  
21 I would like to take half a step back here, that this  
22 provision, the Medicaid expansion that we are talking  
23 about this afternoon, and the provisions we have talked  
24 about yesterday, we have been talking about them in  
25 terms of their effect as measures that solve problems,

1 problems in the economic marketplace, that have resulted  
2 in millions of people not having health care because  
3 they can't afford insurance.

4           There is an important connection, a profound  
5 connection between that problem and liberty. And I do  
6 think it's important that we not lose sight of that.  
7 That in this population of Medicaid eligible people who  
8 will receive health care that they cannot now afford  
9 under this Medicaid expansion, there will be millions of  
10 people with chronic conditions like diabetes and heart  
11 disease, and as a result of the health care that they  
12 will get, they will be unshackled from the disabilities  
13 that those diseases put on them and have the opportunity  
14 to enjoy the blessings of liberty.

15           And the same thing will be true for -- for a  
16 husband whose wife is diagnosed with breast cancer and  
17 who won't face the prospect of being forced into  
18 bankruptcy to try to get care for his wife and face the  
19 risk of having to raise his children alone and I can  
20 multiply example after example after example.

21           In a very fundamental way this Medicaid  
22 expansion, as well as the provisions we discussed  
23 yesterday, secure of the blessings of liberty. And I  
24 think that that is important as the Court's considering  
25 these issues that that be kept in mind. The -- the

1 Congress struggled with the issue of how to deal with  
2 this profound problem of 40 million people without  
3 health care for many years, and it made a judgment, and  
4 its judgment is one that is, I think, in conformity with  
5 lots of experts thought, was the best complex of options  
6 to handle this problem.

7           Maybe they were right, maybe they weren't,  
8 but this is something about which the people of the  
9 United States can deliberate and they can vote, and if  
10 they think it needs to be changed, they can change it.  
11 And I would suggest to the Court with profound respect  
12 for the Court's obligation to ensure that the Federal  
13 Government remains a government of enumerated powers,  
14 that this is not a case in any of its aspects that calls  
15 that into question. That this was a judgment of policy,  
16 that democratically accountable branches of this  
17 government made by their best lights, and I would  
18 encourage this Court to respect that judgment and ask  
19 that the Affordable Care Act, in its entirety, be  
20 upheld. Thank you.

21           CHIEF JUSTICE ROBERTS: Thank you, General.

22           Mr. Clement, you have 5 minutes.

23           REBUTTAL ARGUMENT OF PAUL D. CLEMENT

24           ON BEHALF OF THE PETITIONERS

25           MR. CLEMENT: Thank you, Mr. Chief Justice

1 and may it please the Court:

2 Just a few points in rebuttal. First of all  
3 we talked a lot about the sort of hallmark of coercion,  
4 your money or your life, with somebody with a gun. I  
5 would respectfully suggest that it is equally coercive  
6 or certainly not uncoercive if I say your money or your  
7 life, and by the way, I have discretion as to whether or  
8 not I will shoot the gun. I don't think that eliminates  
9 the coercion.

10 I also don't think this is a discretion that  
11 the Secretary would ever be able to exercise. And the  
12 reason is, we disagree on the details, but the Solicitor  
13 General and I agree that over the years Congress has had  
14 different approaches to expanding Medicare. Sometimes,  
15 as in 1972, it makes the expansion voluntary; that's  
16 also by the way that happened with the stimulus funds,  
17 which were voluntary funds. You didn't lose all your  
18 Medicaid funds, which is why 17 States could say no.

19 Sometimes they take the voluntary approach.  
20 Sometimes, as in 1984, they take the mandatory approach.  
21 If the Secretary exercised the discretion to say you  
22 know what, it really isn't reasonable for you to have to  
23 give up your funding for the visually impaired and the  
24 disabled just to cover these newly eligible people, so  
25 we will make it voluntary; we'll make that

1 discretionary -- that would essentially be creating --  
2 converting a 1984 amendment approach to a 1972 amendment  
3 approach, and I just don't think that is the kind of  
4 discretion that the Secretary has, with all due respect.

5 Now moving on to the next point,  
6 Justice Alito, your hypothetical I think aptly captures  
7 the effect on this, based on the fact that these tax  
8 dollars are being taken from the State's tax base, and  
9 it's not like Steward Machine, where the Federal  
10 Government would say, and oh, by the way, if you don't  
11 take the option we are giving you, we are going to have  
12 a Federal substitute that will go in and we will take  
13 care of the unemployed in your States.

14 Here if you don't take this offer we are  
15 giving you, your tax dollars will fund the other 49  
16 States and you will get nothing. But of course, this  
17 situation is much more coercive even than your  
18 hypothetical, because it is tied directly to the  
19 mandate. It's also tied to the -- to participation in  
20 the preexisting program. So it is as if there was yet  
21 another program for post-secondary education; they gave  
22 them exactly your option -- option -- and then they also  
23 said, oh, and by the way; you not only -- not get these  
24 funds, but you lose the post-secondary fund as well.

25 It's really hard to understand tying the

1 preexisting participation in the program as anything  
2 other than coercive. The Solicitor General makes a lot  
3 of the fact that there are optional benefits under this  
4 program. Well, guess what? After the Medicaid  
5 expansion there will be a lot less opportunity for the  
6 States to exercise those options, because one of the  
7 things that the expansion does -- precisely because the  
8 expansion is designed to convert Medicaid into a program  
9 that satisfies the requirement of the minimum essential  
10 cover of the individual mandate, things that used to be  
11 voluntary will no longer be voluntary. The perfect  
12 example is prescription coverage. It's a big part of  
13 the benefits that some States but not all provide  
14 voluntarily now. It will no longer be voluntary after  
15 the expansion, because the Federal Government has deemed  
16 that prescription drugs to be part of the minimal  
17 essential health coverage that everybody in this country  
18 must have after the mandated date. So that option that  
19 the State has is being removed by the expansion itself.

20 The Chief Justice made the point --

21 JUSTICE GINSBURG: Mr. Clement, may I ask  
22 one question about the bottom line in this case? It  
23 sounds to me like everything you said would be to the  
24 effect of, if Congress continued to do things on a  
25 voluntary basis, so we are getting these new eligibles,

1 and say States, you can have it or not, you can preserve  
2 the program as it existed before, you can opt into this.

3 But you are not asking the Court as relief  
4 to say, well, that's how we -- we -- that's how we cure  
5 the constitutional infirmity; we say this has to be on a  
6 voluntary basis. Instead, you are arguing that this  
7 whole Medicaid addition, that the whole expansion has to  
8 be nullified; and moreover, the entire health care act.  
9 Instead of having the easy repair, you say that if we  
10 accept your position, everything falls.

11 MR. CLEMENT: Well, Justice Ginsburg, if we  
12 can start with the common ground that there is a need  
13 for repair because there is a coercion doctrine and this  
14 statute is coercion, then we are into the question of  
15 remedy. And we do think, we do take the position that  
16 you describe in the remedy, but we would be certainly  
17 happy if we got something here, and we got a recognition  
18 that the coercion doctrine exists; this is coercive; and  
19 we get the remedy that you suggest in the alternative.

20 Let me just finish by saying I certainly  
21 appreciate what the Solicitor General says, that when  
22 you support a policy, you think that the policy spreads  
23 the blessings of liberty. But I would respectfully  
24 suggest that it's a very funny conception of liberty  
25 that forces somebody to purchase an insurance policy

1 whether they want it or not. And it's a very strange  
2 conception of federalism that says that we can simply  
3 give the States an offer that they can't refuse, and  
4 through the spending power which is premised on the  
5 notion that Congress can do more because it's voluntary,  
6 we can force the States to do whatever we tell them to.  
7 That is a direct threat to our federalism.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
10 Clement. And thank you, General Verrilli, Mr. Kneedler,  
11 Mr. Carvin, Mr. Katsas, and in particular, of course,  
12 Mr. Long and Mr. Farr.

13 The case is submitted.

14 (Whereupon, at 2:24 p.m., the case in the  
15 above-entitled matter was submitted.)

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